No. 57246-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THOMAS McCARTHY, *et al*.

Appellants,

v.

CITY OF TACOMA,

Respondent.

BRIEF OF RESPONDENT

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INTRODUCTION

The appellants fail to challenge the trial court's dispositive legal ruling: Click! was not a *public* utility under RCW 35.94.020 or Tacoma City Charter art. iv, § 4.6, so it was not subject to those provisions' public vote requirements. RP 54-55. This appeal is futile.

Their claims are also barred by *res judicata*. Mitchell Shook (a former plaintiff here) and Darrell Bowman raised similar issues in a suit before Judge Speir, who ruled that those public-vote requirements do not apply after the City's Resolution that the Excess Capacity and Click! Assets are surplus and unnecessary to provide ongoing public utility services. This Court dismissed Bowman's appeal from that ruling on September 17, 2020, rendering Judge Speir's rulings final and preclusive. Wash. State Court of Appeals No. 54930-1-II. Those final rulings dispose of this appeal.

Similarly, this Court held that the Excess Capacity and Click! Assets are not a separate utility, but rather a

mere betterment of Tacoma Power – a *service* it provided. ***Coates v. City of Tacoma***, 11 Wn. App. 2d 688, 696, 457 P.3d 1160 (2019), *rev. denied*, 195 Wn.2d 1025 (2020). The appellants fail to even cite (much less challenge) ***Coates***, which is precisely on point, controlling, and adverse to their positions. Their futile claims are barred.

The appellants' futile and precluded claims are also frivolous. They claim Click! *was* a public utility, but ***Coates*** disagreed. They claim RCW 35.94.020's and the City Charter § 4.6's vote requirements apply, but Judges Speir and Chushcoff rightly disagreed. They claim the City's surplus Resolution was arbitrary and capricious, *ultra vires*, or contrary to law, but again, Judge Speir disposed of those false claims. Their every claim is barred and frivolous.

This Court should affirm. It should award the City appellate fees and costs for defending this frivolous appeal under RAP 18.9. There is no reasonable possibility of a reversal here. Every alternative-factual argument is barred.

RESTATEMENT OF THE ISSUES

1. Is this appeal frivolous, where it fails to challenge the trial court's correct ruling that "the Click! System is not a *public* utility within the definition of [RCW] 35.94.020 or within § 4.6 of the City Charter, and so therefore, it was not subject to . . . a vote of the public" (RP 54-55)?

2. Does *res judicata* bar these appellants' claims, where this Court and Judge Speir correctly determined the Excess Capacity and Click! Assets were not a separate utility, but a mere betterment to Tacoma Power's services, so the public-vote provisions of RCW 35.94.020 and City Charter § 4.6 do not apply after the City's Resolution under RCW 35.94.040 that those assets are surplus and nonessential to providing ongoing utility services?

3. Are the appellants' repeated factually and legally insupportable political claims also frivolous?

4. Should this Court award the City attorney fees and costs under RAP 18.9 for responding to this frivolous appeal?

RESTATEMENT OF THE CASE

A. This Court addressed the relevant underlying facts in a related matter: *Coates*.

This Court previously addressed the underlying facts related to this matter in ***Coates***. *See* App. A. The Court will read its prior decision. A brief summary is presented here.

1. Tacoma adopted an Ordinance to maximize efficiency and profitability of its telecommunications systems with Click!

In the mid-1990s, the City wished to benefit from the burgeoning telecom market by building a hybrid fiber-coaxial telecom system. Fiber-optic cable would improve Tacoma Power's generation, distribution, and transmission efficiencies. Coaxial cable would support smart-metering functionality, making monitoring and control more efficient.

While these features were the primary purpose of the proposed telecom system, they would not consume its entire capacity. Tacoma Power wished to use the remaining system capacity to generate revenue by carrying TV and internet service to its Tacoma customers.

A 1996 City ordinance granted Tacoma Power the authority to build the new telecom system. *See* CP 464-96. Under that ordinance, Tacoma Power could use the surplus capacity of the system to operate a TV and internet business, which became Click! CP 491. The ordinance also financially organized the telecom system as a sub-unit of Tacoma Power, sharing expenses and revenue with Tacoma Power's electric utility.[1]

Before implementing the new system, the City filed a declaratory judgment action to determine whether the new Ordinance was lawful. Tacoma taxpayers and Tacoma Power ratepayers opposed the action. The superior court ultimately declared the Ordinance lawful. Neither the taxpayers nor the ratepayers appealed.

[1] "Electric utility" means traditional electric-distribution sub-units, such as generation, power management, and technology services. *See* App. A at n.1.

2. Click! was a subunit of Tacoma Power, running on the Excess Capacity of its telecom system.

Click! thus became one of the six subunits comprising Tacoma Power, whose expenses and revenues are accounted for in the City's Power Fund. As this Court held, "Click! simply runs on the excess capacity of Tacoma Power's telecommunications system, a system . . . designed and implemented to maximize electric utility functionality." ***Coates***, 11 Wn. App. 2d at 697.

Financially speaking, Click! operated independently, maintaining a sub-fund within the Power Fund, which collected Click!'s revenues and paid its expenses. And as this Court also held in ***Coates***, "Click! was clearly intended as a betterment to Tacoma Power's telecommunications system in an effort to maximize a resource and 'reduc[e] … rates and charges,'" consistent with Tacoma City Charter art. iv, § 4.5. *Id*. at 698. Thus, "Click! and Tacoma Power are not separate 'utilities.'" *Id*. at 697.

Eventually, however, Click! was not independently profitable, and the Power Fund had to offset Click!'s net losses. This happened due to technological changes in the electrical-distribution industry, such as the move from wired smart metering to wireless technology. Tacoma Power itself stopped installing wired meters in 2009, and stopped replacing existing wired meters in 2015.[2]

B. After Click! lost profitability due to the move from wired to wireless, the City declared the system's Excess Capacity and Click! Assets to be surplus (unnecessary for ongoing public utility services) and leased it to Rainier Connect.

In 2019, the City Council passed two Resolutions (Nos. 40467 and 40468). CP 845-73. No. 40467 formally declared the Excess Capacity of the telecom system (on which Click! had run) and other Click! Related Assets to be surplus (*i.e.*, not required for continued public utility services) under RCW 35.94.040. CP 845-65. The second

[2] The summary of the facts taken from ***Coates*** ends here.

Resolution, No. 40468, authorized a "Click! Business Transaction Agreement" ("BTA") to transfer operational control of Click! to Rainier Connect. CP 867-83.

Tacoma Power then entered the BTA with Rainier Connect, giving it an Indefeasible Right of Use of the Click! Assets for an initial term of 20 years. CP 1854-2023. On April 1, 2020, the City transferred operational control of the Click! Network to Rainier Connect. CP 2025.

C. The Shook/Bowman suit resolved the issues raised here.

Mitchell Shook – one of the original plaintiffs here, who has since settled out – filed a *pro se* action against the City, which was assigned to Judge Shelly Speir under Pierce Cnty. Cause No. 19-2-11506-3. CP 2029. A second Tacoma Resident, Darrell Bowman, also filed a Complaint, which was consolidated with the Shook matter pending before Judge Speir (the "Shook/Bowman" suit). *Id*.

After receiving full briefing and extensive oral argument, Judge Speir granted the City's Motion for Summary Judgment, dismissing the Shook/Bowman suit with prejudice on February 28, 2020. CP 2137-40. Specifically, Judge Speir ruled (CP 2123):

> The plaintiffs have failed to raise genuine issues of material facts on this issue of whether the City's decisions were arbitrary or capricious. The Court has no basis to invalidate the City's decisions, and as such, the City's resolutions must stand.
>
> Because the City [has] determined that CLICK!'s assets and the excess capacity are surplus and not essential, the public vote requirements in RCW 35.94.040 and Tacoma City Charter Section 4.6 are not triggered.

Bowman appealed Judge Speir's legal ruling to this Court (No. 54930-1-II). CP 2030. This Court accepted the parties' stipulation to dismiss that appeal without costs to either party on July 7, 2020. CP 2142, 2831. This Order rendered Judge Speir's summary judgment ruling final.

D. Procedural History.

McCarthy and Anderson brought this suit to compel a public vote authorizing the BTA, a transaction that had long since been approved and implemented. As further discussed *infra*, their lawsuit is identical in every salient way to the Shook/Bowman matter Judge Speir dismissed. It also flies in the face of ***Coates***.[3]

Following the remand from federal court, the City sought summary judgment. CP 2030. The trial court denied the motion without prejudice, citing concerns that existing utility meters might raise questions whether a vote was required. CP 2154-55, 2833-35. The City later provided two expert declarations confirming that Tacoma Power customers no longer rely on Click! Assets. CP 2173-87.

[3] At one point, Shook amended his Complaint to assert federal claims, so the City removed this case to federal court. CP 2029. After Shook dismissed his claims, the federal court remanded McCarthy and Anderson's state-law claims to Pierce County Superior Court. *Id*.; CP 134.

The City renewed its summary judgment motion, the plaintiffs responded, and the City replied. CP 2032-45, 2586-2636, 2662-67. The plaintiffs each filed a summary judgment motion, to which the City responded and they replied. CP 147-70, 2188-209, 2581-85, 2647-61, 2668-80.

The trial court (the Honorable Bryan Chushcoff, presiding) granted the City's motion and denied the plaintiffs' motions. CP 2694-96. While the trial court did not apply *res judicata* as to Shook/Bowman, it noted this Court might. RP 56. It ruled that while RCW 35A.80.010 authorizes cities to provide utility services, chapter 35A RCW (addressing code cities' public utilities) does not address telecom systems. RP 52-55. In sum, the "the Click! Assets and Excess Capacity in the HFC Network . . . are not required for, and are not essential to, continued public utility service or continued effective utility service." CP 251.

The plaintiffs' appeal fails to challenge Judge Chushcoff's actual ruling. *See infra*, Argument § B.

ARGUMENT

A. The standard of review is *de novo*.

This Court reviews summary judgment orders *de novo*, under the same standard the trial court applies. ***Coates***, 11 Wn. App. 2d at 694 (citation omitted). All facts and reasonable inferences are taken in the light most favorable to the nonmovants. *Id.* (citation omitted). Summary judgment is proper when (as here) no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* (citations omitted). Interpretation of statutes is also a question of law reviewed *de novo*. ***Langhorst v. Dep't of Lab. & Indus.***, 25 Wn. App. 2d 1, 8, 522 P.3d 60 (2022) (citation omitted).

B. The appellants have failed to challenge the trial court's dispositive legal analysis, rendering their appeal futile and frivolous.

McCarthy and Anderson have chosen to ignore the trial court's actual legal analysis. *See* Anderson Brief of Appellant (ABA) 5-8; McCarthy Brief of Appellant (MBA) 2-

3. The problem with their tactic is that they have thereby failed to challenge or even to address the trial judge's correct legal analysis. The upshot of their tactical ignorance is that the legal basis of the trial court's ruling stands unchallenged, providing an adequate and independent ground to affirm. This appeal is futile.

Specifically, Judge Chushcoff recognized that RCW 35A.80.010 authorizes code cities to provide *public* utility services (like fire, water, sewer, and electricity)[4] but chapter 35A RCW does not address private internet or other telecom systems. RP 52-55. Thus, "the Click! System is not a *public* utility within the definition of [RCW] 35.94.020 or within § 4.6 of the City Charter, and so therefore, it was not subject to . . . a vote of the public." RP

[4] Judge Chushcoff *said* "45A.80.010." RP 53. But since there is no such chapter or statute, it is apparent that he *meant* RCW 35A.80.010, the statute he described.

54-55. On *de novo* review, this unchallenged legal analysis disposes of the appellants' claims as a matter of law.

Judge Chushcoff's statutory analysis is unassailable. RCW 35A.80.010 authorizes code cities to "operate utility services as authorized by [RCW] chapters 35.88 [water pollution;] 35.91 [water and sewer);] 35.92 [waterworks, solid waste, asphalt plants, public markets, cold storage, electrical distribution, transportation, water rights] and 35.94 [authority to sell or lease utility works, plants, or systems]." Not included are internet or telecom systems.[5]

Thus, Click! was not a *public* utility that could fall within the purview of the statute permitting cities to sell or lease public utility works, plants, or systems, while requiring a public vote, RCW 35.94.020 ("The ordinance [effecting the sale or lease] shall not take effect until it has

[5] To be sure, chapter 35.99 RCW authorizes cities and towns to issue right-of-way permits for *private* telecom facilities, but it is not cited in 35A.80.010, nor does it authorize cities or towns to own a *public* telecom *utility*.

been submitted to the voters. . .”]). Nor would City Charter § 4.6 apply, as it only forbids the sale, lease, or disposal of an entire utility system, “or parts thereof essential to continued effective utility service.” CP 716. Click! is neither a separate utility (*see* ***Coates***, 11 Wn. App. 2d at 697-99) nor essential to public utility services (*see* CP 846-65, Resolution No. 40467, formally declaring surplus (*i.e.*, not required for continued *public utility* services) the Excess Capacity on which Click! ran, and Related Assets, under RCW 35.94.040). Thus, Charter § 4.6 does not apply.

Judge Chushcoff’s correct legal analysis stands unchallenged. It provides an adequate and independent basis on which to affirm. This Court should do so *de novo* and should award the City attorney fees for having to defend this frivolous, bad faith appeal. *See infra*, Argument § E (citing and discussing RAP 18.9).

C. The plaintiffs' claims are barred by *res judicata*.

Judge Chushcoff declined to rule on the City's *res judicata* argument, albeit while noting that the "Court of Appeals might think *res judicata* applies here." RP 56 (emphasis added). And indeed, claim preclusion presents an alternative ground for affirmance here.

Parties are generally prohibited from litigating claims or issues that were or could have been raised in any earlier suit. ***Eugster v. WSBA***, 198 Wn. App. 758, 786, 397 P.3d 131 (2017). For the doctrine to apply, the prior judgment must have a concurrence of identity with the subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. *Id.*; *see also* ***Rains v. State***, 100 Wn.2d 660, 663, 674 P.2d 165 (1983); ***Berschauer Phillips Constr. Co. v. Mut. of Enumclaw Ins. Co.***, 175 Wn. App. 222, 227-28, 308 P.3d 681 (2013).

The prior judgment also must be final. ***Leija v. Materne Bros., Inc.***, 34 Wn. App. 825, 827, 664 P.2d 527 (1983). "A grant of summary judgment at a prior proceeding is considered a final judgment on the merits." ***Emeson v. Dep't of Corr.***, 194 Wn. App. 617, 626, 376 P.3d 430 (2016) (citing ***DeYoung v. Cenex Ltd.***, 100 Wn. App. 885, 892, 1 P.3d 587 (2000)).

1. Judge Speir's ruling is final and preclusive.

Here, Judge Speir granted summary judgment against ratepayers' claims virtually identical to these ratepayers' claims in Shook/Bowman, and the ***Bowman*** appeal was ultimately dismissed on September 17, 2020, rendering Judge Speir's rulings final. *Supra* Fact § C. Specifically, Judge Speir concluded as a matter of law that Click! was not a stand-alone utility. CP 2120. Moreover, she concluded as matter of law that Click! was property originally acquired for public utility purposes under RCW 35.94.040, and a *part of* a utility system under Tacoma City

Charter § 4.6. *Id*. Thus, because the City determined that the system's Excess Capacity and the Click Assets were surplus and nonessential, the public vote requirements of RCW 35.94.020 and Tacoma City Charter § 4.6 were not triggered. CP 2123. This analysis disposes of this appeal.

In detail, RCW 35.94.040(2) expressly provides that RCW 35.94.*020* (which includes the public vote requirement on which appellants rely) *shall not apply* where (as here) the City determines by Resolution that property originally acquired for public utility purposes is surplus to the city's needs and is not required for providing continued public utility service under RCW 35.94.*040*. Similarly, City Charter § 4.6 forbids disposing without a public vote of "any utility system, or parts thereof <u>essential to continued effective utility service</u>." CP 2884. Since the City resolved that the Excess Capacity and Click! Assets were surplus and nonessential under RCW 35.94.040, neither RCW 35.94.020 nor City Charter § 4.6 applies.

And as Judge Speir properly emphasized: "the Court cannot simply substitute its judgement for that of the City Council," but rather "can only review the City's decision using the arbitrary and capricious standard." CP 2121. She properly rejected that claim because "the CLICK! Network had become outdated," and the City properly considered various factors in deciding to surplus it, so the "plaintiffs have failed to raise genuine issues of material facts on . . . whether the City's decisions were arbitrary or capricious." CP 2121-23. Indeed, no evidence was presented that "the City's decisions were willful or unreasoning or that the City made its decision without consideration of and in disregard of facts and circumstances." CP 2123.

In the trial court here, McCarthy and Anderson raised three main responses against applying *res judicata* to Judge Speir's correct legal rulings: (1) various "equitable" claims (*i.e.,* (a) it deprives them of a day in court (CP 2590-91, 2631); (b) it deprives citizens of a "right" to vote (CP

2591); and (c) the City has "unclean hands" (*id*.); [6] and (2) the persons and parties are not identical, nor are (3) the quality of persons identical (CP 2592-93, 2630-31). Thus, the plaintiffs did not challenge that their subject matter and cause of action are identical to the Shook/Bowman matter. They put only the third and fourth elements at issue here.

Plaintiffs' arguments on these two elements rested on the fundamental notion that they brought their claims as citizen ratepayers, whereas Shook and Bowman brought their claims for personal business reasons. *See* CP 2592-93, 2630-31. Yet on the contrary, Bowman's Complaint alleged that he was "a resident of the city of Tacoma," "a residential customer and ratepayer of Tacoma Power," and "also subscribes to residential Internet access over Click!

[6] As to these so-called "equitable" issues, McCarthy and Anderson have obviously had ample opportunities to pursue their claims. *See, e.g.*, CP 2663-64. Their "right to vote" claim begs the question underlying this entire lawsuit: there is no right to vote here. And the City simply pursued its legal rights in court, which is not inequitable.

Network." CP 2664-65. McCarthy and Anderson alleged a virtually identical status to Bowman (CP 2665):

> [McCarthy] is a resident of the city of Tacoma, county of Pierce, state of Washington. Mr. McCarthy is a residential customer and ratepayer of Tacoma Power. Mr. McCarthy also subscribes to residential Internet access over Click! Network.
>
> [Anderson] is a resident of the city of Tacoma, county of Pierce, state of Washington. Mr. Anderson is a residential customer and ratepayer of Tacoma Power. Mr. Anderson also subscribes to residential Internet access over Click! Network.

Thus, McCarthy and Anderson's own allegations establish that *res judicata* elements three and four are met here. McCarthy, Anderson, and Bowman all asserted the same legal interests as citizen ratepayers. ***In Re Coday,*** 156 Wn.2d 485, 501 130 P.3d 809 (2006) (nominally different parties may have sufficiently identical interests to satisfy the "identity of parties" inquiry); ***Snyder v. Munro,*** 106 Wn.2d 380, 383-84, 721 P.2d 962 (1986) (same); *see also* ***City of Tacoma v. Taxpayers of Tacoma,*** 357 U.S. 320, 340-41, 78 S. Ct. 1209, 2 L. Ed. 2d 1345 (1958) (final

judgment against State barred subsequent citizen action because citizens' public rights were represented by the State in the earlier proceeding). Identity of parties and quality of parties exists here.

This alone is enough to bar plaintiffs' claims, but there is more.

2. *Coates* – which appellants fail to even cite – is controlling and adverse to their position.

It is troubling that McCarthy and Anderson fail to even *cite* obviously controlling authority in this jurisdiction – indeed, in *this Court* – that is contrary to their position: ***Coates***, *supra*. "A lawyer shall not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing party." RPC 3.3(a)(3). *Pro se* appellants are held to the same standards as lawyers. *See, e.g.,* ***State v. Taplin***, 2020 Wash. App. LEXIS 2111, at *10 (July 28, 2020) (GR

14.1 persuasive authority) ("pro se petitioner is held to the same responsibility as a lawyer and is required to follow applicable statutes and rules") (citing ***PRP of Connick***, 144 Wn.2d 442, 455, 28 P.3d 729 (2001)); ***Edwards v. Le Duc***, 157 Wn. App. 455, 460, 238 P.3d 1187 (2010); ***State Farm Mut. Auto. Ins. Co. v. Avery***, 114 Wn. App. 299, 310, 57 P.3d 300 (2002).

Coates is on point, controlling, and contrary to these ratepayers' arguments. This Court held that Click! was not a separate utility from Tacoma Power's electric utility. ***Coates***, 11 Wn. App. 2d at 696. That is, Click! was "simply using the excess capacity of the electric utility's existing infrastructure." *Id.* at 697. Merely providing "an additional service using the utility's existing infrastructure is not a separate undertaking." *Id*. Rather, Click!'s "cable TV and internet service capabilities were incidental and merely a way to maximize the new technology's potential." *Id*. Click! was simply a "betterment" of Tacoma Power under City

Charter § 4.5. *Id*. at 698-99. Thus, this Court held that the City did not violate its Charter art. iv, § 4.5, which forbade the City from using utility revenues for purposes other than necessary operating expenses: betterments are necessary operating expenses. *Id*. at 698-99.

Taken together, the Shook/Bowman and ***Coates*** decisions resolved all issues raised – or that could have been raised – by the ratepayers in those matters, barring these ratepayers' identical claims. Yet the appellants fail to even cite ***Coates*** or ***Bowman*** among their collective ***142 pages*** of briefing. Nor do the arguments they do bring raise any *genuine* issue of *material* fact. Rather, these bad-faith appeals are merely politics by other means – and losing politics at that. This Court should affirm and award fees and costs to the City under RAP 18.9. *See infra*, Argument § E.

D. The appellants' futile political arguments are frivolous.

The appellants simply lost their political fight in the City Council. They want our courts to override that proper legislative determination. It is, of course, fundamental to our system of justice that courts will not do that. This frivolous appeal thus was brought in bad faith.

1. Anderson's appeal is frivolous.

Since the above legal analyses dispose of this appeal, it is frivolous – that is, "there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there [is] no reasonable possibility of reversal." ***Pain Diagnostics v. Brockman***, 97 Wn. App. 691, 701, 988 P.2d 972 (1999) (quoting ***Delany v. Canning***, 84 Wn. App. 498, 510, 929 P.2d 475 (1997)). This is further addressed *infra*, Argument § E.

Anderson raises two assignments of error with six subparts) and eight issues. ABA 5-8. None are debatable.

a. Anderson's first Assignment of Error (AOE) is frivolous.

Anderson first claims the trial court erred both in granting the City's motion for summary judgment and in denying the plaintiffs' motions, for two reasons. ABA 5-6. Anderson's first reason is that "Click! Network is a public utility system and/or[7] part thereof subject to the provision of Chapter 35.94 RCW." ABA 6.

But ***Coates*** holds that Click! was *not* a stand-alone public utility. 11 Wn. App. 2d at 696. That is, Click! was "simply using the excess capacity of the electric utility's existing infrastructure." *Id.* at 697. Merely providing "an additional service using the utility's existing infrastructure is not a separate undertaking." *Id*. Rather, Click!'s "cable TV and internet service capabilities were incidental and merely a way to maximize the new technology's potential." *Id*. Click! was simply a "betterment" of Tacoma Power

[7] The use of "and/or" here is rather telling: it cannot be both.

under City Charter § 4.5, not a separate utility. *Id*. at 698-99. Judge Speir ruled the same. CP 2120.

Coates is on-point – it is based on *exactly* the same facts – and controlling in this jurisdiction. There is no reasonable possibility that this Court would change its holding – if for no other reason, then that the appellants nowhere *ask* this Court to disavow or even distinguish ***Coates***, much less make a reasoned argument as to why it is incorrect or harmful. *See, e.g.*, ***Garfield Cnty. Transp. Auth. v. State***, 196 Wn.2d 378, 390 n.1, 473 P.3d 1205 (2020) (citing ***Deggs v. Asbestos Corp.***, 186 Wn.2d 716, 727-28, 381 P.3d 32 (2016) (quoting ***In re Stranger Creek v. Alby***, 77 Wn.2d 649, 653, 466 P.2d 508 (1970))). This "reason" is frivolous.

Anderson's second reason is that "Click! Network is a public utility system and/or an essential part thereof subject to the provisions of Section 4.6 of the Tacoma City Charter." ABA 6. Since this reason is identical to the first

reason except for the reference to City Charter § 4.6, most of it is frivolous for the same reasons noted above.

Again, Judge Speir ruled as a matter of law that because the City properly surplused the Excess Capacity and Click! Assets under RCW 35.94.040, Charter § 4.6's prohibition on selling or leasing "parts" of a public utility without a public vote *if they are essential to continued effective utility service* does not apply. CP 2123, 2884.

b. Anderson's second AOE is frivolous.

Anderson's second AOE has four subparts. ABA 6-7. His first two subparts are that (C) the Click! Network is not and cannot be surplus under RCW 35.94.040 and (D) the City's determination to the contrary was arbitrary and capricious. ABA 6. These assertions of course fly in the face of Judge Speir's ruling that the City's Resolution to surplus its Excess Capacity and Click! Assets was not arbitrary and capricious. CP 2123. These assertions are thus barred and this argument is frivolous.

i. The City Resolution to surplus the Excess Capacity and Click! Assets is not "void." (ABA 47-60).

Beyond that insurmountable barrier, Anderson argues that the City's decision to surplus the Excess Capacity and Click! Assets is void because it was (1) *ultra vires*; (2) contrary to law; or (3) arbitrary and capricious. ABA 47-60. He claims that the decision is *ultra vires* and contrary to law because "RCW 35.94.040 does not provide cities authority to surplus entire operating utility systems like Click!." ABA 49. But not only does this argument contradict Judge Speir's and this Court's prior decisions – albeit without mentioning them – it contradicts the statute:

> (1) Whenever a city shall determine, by resolution of its legislative authority, that **any lands, property, or equipment originally acquired for public utility purposes is surplus to the city's needs and is not required for providing continued public utility service** . . . **then such legislative authority by resolution and after a public hearing may cause such lands, property, or equipment to be leased, sold, or conveyed.** . . .

> (2) The provisions of **RCW 35.94.020** and 35.94.030 **shall not apply to dispositions authorized by this section**.

RCW 35.94.040 (emphases added).

This statute *unequivocally* grants cities the power to determine by resolution that *any* land, property, or equipment originally acquired for public utility purposes is surplus to the City's needs and is not required for providing continued public utility service. *Id*. It does not limit this power to only parts of a utility. And of course, the Excess Capacity and Click! Assets were *parts* of a utility, not an entire utility, as repeatedly explained *supra* and *infra*.

In sum, Anderson's *ultra vires* and contrary to law arguments are frivolous.

ii. City Charter § 4.6 does not apply.

Anderson argues that even if the City's decision to surplus the Excess Capacity and Click! Assets was authorized by RCW 35.94.040, the public vote requirement in City Charter § 4.6 still applies. ABA 49-50. This too is

frivolous: § 4.6 applies only to the sale, lease, or disposal of an entire utility system, "or parts thereof essential to continued effective utility service." CP 2884. Judge Speir correctly ruled the City's surplus Resolution rendered the "parts thereof" nonessential, so § 4.6 does not apply.

c. Anderson's arguments that Click! *is* a public utility are frivolous.

Untethered to any particular AOE, Anderson argues *ad nauseum* that Click! *is* a public utility. ABA 15-41. He fails to mention this Court's controlling holding to the contrary. ***Coates***, 11 Wn. App. 2d at 696. All these arguments are frivolous.

He first relies on dictionaries to define the term "public utility." ABA 18-20. Denotations notwithstanding, Click! was a betterment that ran on the Excess Capacity of Tacoma Power's telecom system. ***Coates***, 11 Wn. App. 2d at 696-99. It was not, in and of itself, a public utility. *Id*.

Anderson makes a lengthy argument about the legislative history of RCW 35.94.010. ABA 20-30. He says our Supreme Court "construed and applied RCW 35.94.010 and RCW 35.94.020" in ***Bremerton Muni. League v. Bremer***, 15 Wn.2d 231, 130 P.2d 367 (***1942***). ABA 20. That is absurd: they were not even adopted until 1973 and 1986, as Anderson admits. ABA 22 n.5.

Anderson's actual argument seems to be that ***Bremer*** interpreted Remington Rev. Statute § 9512, a predecessor statute, which was eventually codified in simplified form in RCW 35.94.010 & .020. ABA 21-26. And the point of his interpretive history is to argue that because "telephone and telegraph" services were mentioned as public utilities in RRS § 9512, "telecommunications" must be a public utility under chapter RCW 35.94. ABA 26-30.

But none of this history matters, for at least three reasons. First, the Excess Capacity and Click! Assets were a betterment, not a separate utility. ***Coates***, 11 Wn. App.

2d at 696-99. Second, RCW 35.94.040(2) says that RCW 35.94.020 & .030 *shall not apply* to dispositions authorized under RCW 35.94.040(1), such as the City's Resolution to surplus the Excess Capacity and Click! Assets. Third, ***Bremer*** (which has never been cited in any Washington appellate decision) is inapposite.

There, Bremerton leased a municipal wharf area to a private company. ***Bremer***, 15 Wn.2d at 232-33. The trial court voided the lease under RRS §§ 9512-9514 because the city did not own the area at issue and thus could not lease it. *Id.* at 236-37. The Supreme Court affirmed, holding that the city could not sell or lease an "entire utility, not something merely incident thereto," without a public vote. *Id.* at 238. True.

But again, that has nothing to do with this case. This Court has already determined that Click! was not an "entire utility," but just a betterment – a decision that is final and binding. ***Coates***, 11 Wn. App. 2d at 696-99. And

Anderson's claim that ***Bremer*** requires this Court to hold otherwise is simply false: the argument there was that the statute did not list wharves or docks, so the Court held that "*any similar or dissimilar utility or system*" in RRS § 9512 swept in wharves and docs. 15 Wn.2d at 237. The Court was not addressing whether a mere betterment to a utility is a utility, much less whether RCW 35.94.040 excludes application of §§ .020 & .030 where, as here, the City properly surplused the betterment. It does.

Anderson argues that the City's own representations make Click! a public utility. ABA 30-35. Most of his assertions simply misrepresent the record. As this Court held in ***Coates***, Click! *ran on* the Excess Capacity of the City's telecom system – it was not the system itself, but merely a betterment. The City never represented otherwise. Statements that Click! was a *service* of Tacoma Power cannot prove that Click! was a *public utility*. This

Court's holdings – which have not been challenged here – are correct and dispose of this argument.[8]

Anderson argues that even if the City's alleged representations cannot turn a betterment into a utility, other statutes can do so. ABA 35-38. But none of those statutes apply to Click! – they apply to Tacoma Power. *Id.* And the question is whether a mere betterment to Tacoma Power can be an entire separate utility: it cannot.

Anderson argues that the trial court should have considered the "physical infrastructure" and "services provided" to determine whether Click! was a public utility. ABA 38-42. He begins by making the false assertion that Click! *is* the hybrid fiber coaxial telecom system on which it ran. ABA 38. That is obviously false. Tacoma Power still owns and operates its 1,426 miles of coaxial lines and 369

[8] Moreover, Anderson's argument is that Click! was a public utility subject to chapter 35.94. ABA 30-35. Even if that could be true – which it cannot – the City's RCW 35.94.040 Resolution made §§ .020 and .030 inapplicable.

miles of fiber on the Excess Capacity of which Click! ran. *See, e.g.*, ***Coates***, 11 Wn. App. 2d at 691, 693.

Beyond that, as fully explained *supra*, the trial court's conclusion that Click! itself is not a public utility subject to chapter 35.94 RCW is correct. *Supra*, Argument § B.

Anderson argues that the trial court erred in relying on ***Issaquah v. Teleprompter Corp.***, 93 Wn.2d 567, 611 P.2d 741 (1980) rather than ***Bremer***. ABA 42-47. Anderson admits that ***Issaquah*** holds that cable television is not a public utility, but argues that it did so under "**different statutes**" and based upon representations of counsel. *Id*. As repeatedly noted above, however, *this Court* has held that *this system* is not a public utility. ***Coates***, 11 Wn. App.2d at 697. That is dispositive here.

d. Anderson's argument to void the City's Resolution to surplus the Excess Capacity and Click! Assets because they are unnecessary to provide ongoing public utility services is also frivolous.

Anderson argues that the City's determination that the Excess Capacity and Click! Assets are surplus and unnecessary to provide utility services is void and "arbitrary and capricious." ABA 47-50. As Judge Speir correctly ruled, this argument is incorrect – and that unchallenged and binding ruling makes this argument frivolous.

Anderson again falsely claims that the City found the telecom system (a/k/a the HFC Network) itself to be surplus. ABA 47-48. Rather, Resolution U-11116 declares "surplus utility-owned property including certain inventory, equipment and vehicles allocated to the Click! Network together with **the Excess Capacity of the Tacoma Power HFC Network**, ***part of which*** is used by what is commonly referred to as the Click! Network." CP 244 (emphases added). Further (CP 246-47),

> [The] "Excess Capacity of the HFC Network" is generally comprised of:
>
> (i) coaxial cable, conduit housing only coaxial cable, conduit installed for service drops (whether or not currently housing coaxial cable), and coaxial cable service drops installed in the Click! Network service area;
>
> (ii) specific strands of fiber in the Tacoma Power fiber network that are not reserved for current and future use by Tacoma Power for utility purposes, conduit housing such fiber along routes that do not include reserved utility fiber, and excess space in conduit housing such fiber and reserved utility fiber;
>
> (iii) electronic equipment and related hardware installed in the HUB sites and in rights-of-way; and is defined as the "Tacoma Power Commercial System", and is described in more detail, in the draft proposed . . . Click! Business Transaction Agreement. . . . [Paragraphing altered for readability.]

Thus, "the Click! Assets and Excess Capacity in the HFC Network . . . are not required for, and are not essential to, continued public utility service or continued effective utility service." CP 251. They are surplus to the City's needs. *Id*.

Anderson *cannot* argue that *this* Resolution is arbitrary or capricious or *ultra vires* or contrary to law because it is *based on* the law. Rather, he argues that

surplusing an *entire utility* would be those things. *See, e.g.*, ABA 48-49. Since that is not what happened here, his argument based on alternative facts is frivolous.

Anderson *again* argues that City Charter § 4.6 nonetheless requires a vote. ABA 49-50. But again, Judge Speir correctly ruled that because § 4.6 applies only to parts of the system "essential to continued effective utility service," it does not apply where, as here, "the Click! Assets and Excess Capacity in the HFC Network . . . are not required for, and are not essential to, continued public utility service or continued effective utility service." CP 251, 2127. This argument has not gained validity with repetition.

Anderson makes *another* lengthy argument that the Excess Capacity and Click! Assets were an entire separate utility, based on alleged "legislative history" – largely individual comments (ABA 50-57), which are *not* legislative history. *See, e.g.*, ***In re F.D. Processing***, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992) ("the comments of a single

legislator are generally considered inadequate to establish legislative intent") (citing ***Yakima v. Int'l Ass'n of Fire Fighters, Local 469***, 117 Wn.2d 655, 677, 818 P.2d 1076 (1991); ***Convention Ctr. Coalition v. Seattle***, 107 Wn.2d 370, 375, 730 P.2d 636 (1986)). And again, this Court ruled to the contrary in ***Coates***, 11 Wn. App. 2d at 696. This argument too remains frivolous.

Anderson argues that the City *must* provide telecom services because (again) Click! *itself* is a public utility. ABA 57-60. But again, it is not: rather, it was a betterment of the services Tacoma Power provides. ***Coates*** , 11 Wn. App. at 697-99.[9] This claim still has no conceivable merit.

[9] Anderson cites ***Inland Empire Rural Electrification, Inc. v. Dep't of Pub. Serv.***, 199 Wash. 527, 537-38, 92 P.2d 258 (1939)). ABA 60. But in ***Inland***, our Supreme Court held that a corporation financed by the United States rural electrification administration was *not* a public service corporation subject to regulation as a public service or utility. 199 Wash. at 539. ***Inland*** is inapposite and does not support Anderson's claims.

e. Anderson's "estoppel" argument is false and frivolous.

Anderson *repeats* his false representations at ABA Argument § D, claiming the City should be "estopped" to deny that the Excess Capacity and Click! Assets are themselves a separate utility. *Compare* ABA 60-62 *with supra*, Argument § D.1.c. & d. This claim is still frivolous.

f. As Anderson admits, the trial court did not err in ruling *as a matter of law*, nor did it err in rejecting Anderson's false counterfactual allegations, which have no basis in reality, much less in this record.

Anderson admits (finally) that the relevant question, "whether Click! is a public utility subject to the vote requirements in RCW 35.94.020 and Section 4.6 of the City Charter[,] **is a legal question reviewed *de novo***." ABA 63 (emphasis added). Thus, his *factual* appeal is frivolous. Yet Anderson again argues that the record does not support the trial court's rulings. ABA 61-63. For all the reasons stated above, this claim lacks the most basic candor toward this tribunal. Frivolous is as frivolous does.

2. McCarthy's appeal is also frivolous.

Rather than submit one brief, or a short brief adopting Anderson's arguments (*see* RAP 10.1(g)), McCarthy has chosen to file his own duplicative brief, larded with alternative facts and some of the frivolous arguments Anderson raises. He raises five Assignments of Error and nine Issues. MBA 2-3. His Issues are entirely based on false counterfactuals – just like Anderson's.

a. Click! is not a public utility – it is a service.

McCarthy argues that Click! is a public utility. MBA 61-66. It is not. *See supra*, Argument §§ B, C.1 & 2, D.1.a & c. Regardless of whether a *telecom system* might be a public utility, the Excess Capacity and Click! Assets are not, as this Court held. ***Coates***, 11 Wn. App. 2d at 696. Click! was a service provided to Tacoma Power customers.

McCarthy mischaracterizes (or just misunderstands) the trial court's ruling. *Compare supra*, Argument § B *with* MBA 66-69. He relies on inapplicable statutes and

regulations. MBA 68-69. Again, ***Coates*** held the Excess Capacity and Click! Assets were not a separate utility, but merely a betterment of Tacoma Power's service.

b. The City's Resolution to surplus the Excess Capacity and Click! Assets was not "primary ultra-virus" or void.

McCarthy argues that the City's surplus declaration for the Excess Capacity and Click! Assets was "primary ultra-virus" and void. MBA 70-75. Whatever that might mean, he essentially parrots (badly) Anderson's arguments about alleged legislative history for RSS § 9512, *et seq*. *Id*. Those arguments are still wrong. *Supra* Argument § D.1.c.

c. McCarthy's political "policy" arguments are misdirected and frivolous.

While it is a bit difficult to understand him, McCarthy seems to make some "policy" arguments about why Click! was a good thing. MBA 75-78. Such arguments might have been directed to the City Council long ago, but this Court does not set political policy. These claims too are frivolous.

E. This Court should award the City attorney fees and costs on appeal under RAP 18.9.

The City requests attorney fees and costs on appeal for responding to this frivolous appeal under RAP 18.9(a):

> [This Court] may order a party or counsel, … who uses these rules for the purpose of delay [or] files a frivolous appeal, … to pay terms or compensatory damages to any other party who has been harmed[.]

The primary inquiry is "whether, when considering the record as a whole, the appeal is frivolous"; that is, "whether it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal." ***Streater v. White***, 26 Wn. App. 430, 434, 613 P.2d 187 (1980). In making this determination, the Court is guided by the following considerations (*id*. at 434-35):

> (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

For example, Division One granted appellate fees where, as here, courts had repeatedly told the appellant that it was wrong, and its "brief on appeal [was] totally devoid of any relevant authority to support its arguments, and its claims [did] not have any basis in law":

> This appeal is not based on subtle or even gross distinctions of law. Since 2002, Fidelity has been told by every authority it has approached that the challenged charts are legal. The DFI, the federal district court, and finally the trial court all concluded that the mortgage rates provided in the Times' charts were within federal guidelines and were not illegal. The trial court also expressly stated that it found "no evidence" of any proximate causation of damages by any defendant. Yet Fidelity pressed its claim . . . .

Fid. Mortgage v. Seattle Times, 131 Wn. App. 462, 473, 128 P.3d 621 (2005).

As short, legally incorrect, and frivolous as his arguments are, McCarthy's alternative "facts" run roughly *55 pages*. MBA 4-59. His Appendix, which is chock-full of irrelevant stuff, goes another 100 pages. All this for roughly 19 pages of frivolous, duplicative, and meaningless

Argument that is not only unsupported by any relevant law, but is directly contrary to controlling precedent – which McCarthy intentionally fails to cite even though it was raised in the trial court. This is bad faith, abusive litigation.

Anderson's briefing is perhaps a bit more professional, but no less abusive. Rather than blather-on about his insupportable alternative "facts" in his Statement of the Case, he throws them into his Argument, running roughly 50 pages. Since none of his factual arguments matter – they are all contrary to the actual language of ***Coates***, Judge Speir, and Judge Chushcoff, not to mention that of the relevant Resolutions, City Charter, and statutes – nothing of merit remains. This is pointless and abusive. And his failure to cite controlling law in this jurisdiction – *this Court's law* – lacks candor, to put it mildly.

The tone of the appellants' briefing speaks louder than their logorrhea (**23,884 words** combined). Their abusive accusations of "bad faith" by the City – completely

unsupported by any relevant evidence or law – are simply feigned indignation about their long lost political cause.

For what? *Television*? *Internet*? Those services plainly are readily available. Their sham rage betrays their bad faith. This Court should award the City fees on appeal.

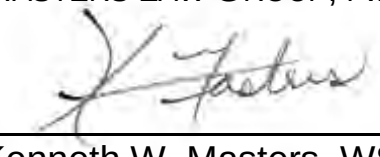
CONCLUSION

This Court should affirm and award the City attorney fees and costs under RAP 18.9.

The undersigned hereby certifies under RAP 18.17(2)(b) that this document contains **7,476** words.

RESPECTFULLY SUBMITTED this 28th day of April, 2023.

MASTERS LAW GROUP, P.L.L.C.



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APPENDIX
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APPENDIX A

Coates v. City of Tacoma,
11 Wn. App. 2d 688, 457 P.3d 1160 (2019),
rev. denied, 195 Wn.2d 1025 (2020)

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Coates v. City of Tacoma

Court of Appeals of Washington, Division Two

September 9, 2019, Oral Argument; December 10, 2019, Filed

No. 51695-1-II

Reporter
11 Wn. App. 2d 688 *; 457 P.3d 1160 **; 2019 Wash. App. LEXIS 3083 ***; 2019 WL 6716311

EDWARD E. (TED) COATES ET AL., *Respondents*, v. THE CITY OF TACOMA, *Petitioner*.

Notice: Order Granting Motion to Publish February 11, 2020.

Subsequent History: Reported at *Coates v. City of Tacoma, 11 Wn. App. 2d 1041, 457 P.3d 1160, 2019 Wash. App. LEXIS 3132 (Dec. 10, 2019)*

Ordered published by Coates v. City of Tacoma, 2020 Wash. App. LEXIS 310 (Wash. Ct. App., Feb. 11, 2020)

Review denied by Coates v. City of Tacoma, 2020 Wash. LEXIS 391 (Wash., July 8, 2020)

Prior History: [*1]** Appeal from Pierce County Superior Court. Docket No: 17-2-08907-4. Judge signing: Honorable Susan K Serko. Judgment or order under review. Date filed: 03/30/2018.

Core Terms

telecommunications, electrical, ratepayers, public service, cable television, ordinance, hybrid, customers, electric utility, fiber-coaxial, Internet, functions, accounting, Bonds, dictionary, internet service, cable, local government, meters, public improvement, electric system, infrastructure, expenses, declaratory judgment action, summary judgment, superior court, transmission, generation, municipal, utilize

Headnotes/Summary

Summary

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: Ratepayers sought a judgment declaring that funds from a city's electric utility were unlawfully funding and subsidizing a TV and Internet business that was part a telecommunications system organized financially as a subunit of the utility.

Superior Court: The Superior Court for Pierce County, No. 17-2-08907-4, Susan Serko, J., on March 30, 2018, entered a summary judgment in favor of the plaintiffs.

Court of Appeals: Holding that the TV and Internet business's financial structure did not violate the local government accounting statute, RCW 43.09.210, or provisions in the city charter, the court *reverses* the judgment.

Headnotes

WASHINGTON OFFICIAL REPORTS HEADNOTES

WA[1] [1]

Municipal Corporations > Services Provided by Another Municipal Undertaking > Compensation > Necessity.

RCW 43.09.210, the local government accounting statute, prohibits one government entity from receiving services from another government entity for free or at reduced cost absent a specific statutory exemption.

WA[2] [2]

Statutes > Construction > Meaning of Words > Relationship to Other Words > Noscitur A Sociis.

Under the doctrine of noscitur a sociis, a single word in a statute should not be read in isolation. Instead, the meaning of a statutory word may be indicated or controlled by its relationship with other words in the same statute with which it is associated.

WA[3] [3]

Statutes > Construction > Considered as a Whole > Meaning to All Words > In General.

Each word of a statute must be accorded meaning. Whenever possible, a statute is to be construed so that no clause, sentence, or word is rendered superfluous, void, or insignificant.

WA[4] [4]

Utility Services > Municipal Corporations > Services Provided by Another Municipal Undertaking > Compensation > Separate "Undertaking" > Additional Service Utilizing Utility's Existing Infrastructure.

Under RCW 43.09.210, the local government accounting statute, which prohibits one government entity from receiving services from another government entity for free or at reduced cost absent a specific statutory exemption, a municipality's provision of an additional service using a municipal utility's existing infrastructure does not constitute a separate "undertaking."

WA[5] [5]

Municipal Corporations > Utilities > Revenue > Limitation to Funding Specific Utility > Scope > Additional Service Utilizing Utility's Existing Infrastructure.

For purposes of a municipal law providing that a municipal utility's revenue cannot be used for any purposes other than the necessary operating expenses of the utility, including additions and betterments thereto, a municipality's provision of an additional service using a municipal utility's existing infrastructure and capacity constitutes a betterment to the utility, not a separate utility.

MELNICK, J., delivered the opinion of the court, in which GLASGOW, J., concurred. FEARING, J., filed a dissenting opinion.

Municipal Corporations > Services Provided by Another Municipal Undertaking > Compensation > Separate "Undertaking" > Additional Service Utilizing Utility's Existing Infrastructure.

Counsel: Elizabeth Thomas, Mark S. Filipini, Kari L. Vander Stoep, and *Daniel Charles V. Wolf* (of *K&L Gates LLP*); and Kenneth W. Masters (of *Masters Law Group PLLC*), for petitioner.

David F. Jurca, Andrew J. Kinstler, and Emma Kazaryan (of *Helsell Fetterman LLP*), for respondents.

Judges: Authored by Rich Melnick. Concurring: Rebecca Glasgow, Dissenting: George Fearing.

Opinion by: Rich Melnick

Opinion

[*689] [1162]**

¶1 MELNICK, J. — In 1996, a City of Tacoma ordinance granted Tacoma Power the authority to build a telecommunications system. Under the ordinance, Tacoma Power would utilize a portion of this system to operate a TV and internet business, later named the Click! Network (Click!). The ordinance also established that the telecommunications system would be organized financially as a sub-unit of Tacoma Power and thus would share expenses and revenue with Tacoma Power's electric utility.[1]

[*690]

¶2 Before implementing the system, the City of Tacoma filed a declaratory judgment action to determine the lawfulness of the ordinance. The taxpayers **[***2]** of the City of Tacoma and ratepayers of Tacoma Power opposed it. After two summary judgment rulings, the superior court entered a declaratory judgment that the ordinance was lawful. The taxpayers and ratepayers never appealed.

¶3 In 2017, Plaintiffs Ted Coates, Michael Crowley, Mark and Margaret Bubenik, Thomas Oldfield, and Industrial Customers of Northwest Utilities (collectively, the Ratepayers) sued the City alleging that, due to Tacoma Power's financial structure as it related to Click!, the funds from Tacoma Power's electric utility

[1] We refer to Tacoma Power's "electric utility" as its traditional electric-distribution sub-units, such as generation, power management, and technology services.

were unlawfully funding and subsidizing Click!. The superior court agreed and granted summary judgment in the Ratepayers' favor.

¶4 We reverse.

FACTS[2]

I. TACOMA POWER

¶5 The City of Tacoma owns Tacoma Public Utilities (TPU). TPU is governed by the Public Utility Board and consists of Tacoma Power, Tacoma Water, and Tacoma Rail. Click! is one of six sub-units that comprise Tacoma Power. The other five sub-units consist of more traditional electric-distribution functions like generation, power management, and technology services. Tacoma Power's expenses and revenues are accounted for in the City's Power Fund. Financially, Click! is intended to operate independently, **[***3]** and as a result, Click! maintains a sub-fund within the Power Fund. This fund collects Click!'s revenues and pays its expenses. In recent years, however, Click! has not been independently profitable, and the Power Fund has been used to offset Click!'s net losses.

[*691] II. HISTORY

A. Electric Industry in the 1990s

¶6 In the mid-1990s, the electric-distribution market underwent changes because of, among other factors, technological developments and changing consumer-demand market forces. Tacoma Power established a team to explore how it could respond to these changes. It decided "the best option was to construct a hybrid fiber coaxial telecommunications system." Clerk's Papers (CP) at 926.

¶7 The fiber part of the telecommunications system would improve Tacoma Power's generation, distribution, and transmission efficiencies, and the coaxial part of the system would support smart-metering functionality. The smart-metering functionality would allow Tacoma Power to monitor data in real time, which would make billing, connection and disconnection, and pay-as-you-go electricity consumption programs run more efficiently.

¶8 The primary reason for building the telecommunications system "was to provide a platform for more efficient use **[***4]** and control of Tacoma Power's generation, transmission, **[**1163]** and distribution assets and to allow for the installation of smart meters." CP at 971 n.1. However, these features did not consume the entire load of the system. Tacoma Power realized that it could maximize revenue from the system by utilizing the remaining load and decided to do so by selling cable TV and internet service. Thus, the idea for Click! arose.

B. Ordinance

¶9 In 1996, the City passed an ordinance that created "a separate [telecommunications] system as part of the Electric System." CP at 122. It established infrastructure improvements and discussed the functions served by the new system. The first nine functions all related to traditional electric utility functions. The final three functions provided **[*692]** TV service, internet service, and the transport of other signals including video on demand and high-speed data. The ordinance contemplated that the infrastructure improvements would serve all of the functions listed.

¶10 Regarding financial arrangements, the ordinance provided that the TV and internet business would be organized as a sub-unit of Tacoma Power and would share revenue with Tacoma Power. Additionally, to provide part of the funds necessary **[***5]** to finance the project, the City proposed issuing $1 million in bonds.

C. Declaratory Judgment Action

¶11 In 1996, before implementing the telecommunications system, the City filed a declaratory judgment action in superior court seeking to establish the legality of the ordinance. The taxpayers of the City and ratepayers of Tacoma Power opposed it.

¶12 After two summary judgment motions, the court declared that the City had the authority to provide cable TV service, "lease telecommunications facilities and capacity to telecommunications providers," and issue bonds to help finance those operations. CP at 789.

¶13 As a result of the court's rulings, the City implemented the telecommunications system. The portion of the system used to sell TV and internet service was later called Click!.

D. Technological Changes in the 2000s

¶14 At its inception, the telecommunications system allowed for efficient and remote operation of Tacoma Power's infrastructure. Subsequently, technological changes in the electric-distribution industry impacted

[2] Where the facts are written in the present tense, they refer to facts that existed at the time of the summary judgment motions.

how beneficial the system was to Tacoma Power's electric utility. As an example, although Tacoma Power initially intended the system to be used for smart metering, the industry switched **[***6]** to primarily using wireless meters. Tacoma Power itself **[*693]** stopped installing wired meters in 2009 and stopped replacing existing wired meters in 2015.

¶15 However, more recent data shows that the telecommunications system still serves a portion of its anticipated electric-distribution functions. Tacoma Power continues to use it to gather certain information and to control certain operations of electric generation, distribution, and transmission. It also still connects the remaining 14,240 wired smart meters.

¶16 The telecommunications system also continues to be utilized for Click!-related purposes. Click! utilizes the excess capacity on the system as a TV retailer and as an internet service wholesaler.

III. CURRENT LAWSUIT

¶17 In 2017, the Ratepayers filed a lawsuit for declaratory relief against Tacoma Power alleging that it was unlawfully subsidizing Click!. The Ratepayers alleged that Tacoma Power's financial structure violated the local government accounting statute, *RCW 43.09.210*, and Tacoma City Charter art. IV, § 4.5.[3]

¶18 The Ratepayers moved for partial summary judgment. The City opposed the **[**1164]** motion and also cross-moved for summary judgment.

¶19 After hearing argument, the trial court granted the Ratepayers' motion. The **[***7]** City sought discretionary review, which we granted.

[*694] ANALYSIS

I. LEGAL PRINCIPLES

¶20 We review an order for summary judgment de novo, performing the same inquiry as the trial court. *Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006)*. "We consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party." *Rublee v. Carrier Corp., 192 Wn.2d 190, 199, 428 P.3d 1207 (2018)*. "Summary judgment is proper when the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Munich v. Skagit Emergency Commc'ns Ctr., 175 Wn.2d 871, 877, 288 P.3d 328 (2012)*.

¶21 We review questions of statutory interpretation de novo. *Flight Options, LLC v. Dep't of Revenue, 172 Wn.2d 487, 495, 259 P.3d 234 (2011)*. In interpreting statutes, "[t]he goal … is to ascertain and carry out the legislature's intent." *Jametsky v. Olsen, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014)*. We give effect to the plain meaning of the statute as "derived from the context of the entire act as well as any 'related statutes which disclose legislative intent about the provision in question.'" *Jametsky, 179 Wn.2d at 762* (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)*).

¶22 If a statute's meaning "is plain on its face, then we must give effect to that meaning as an expression of legislative intent." *Blomstrom v. Tripp, 189 Wn.2d 379, 390, 402 P.3d 831 (2017)*. However, if "after this inquiry, the statute remains ambiguous or unclear, it is appropriate to resort to canons of construction and legislative history." *Blomstrom, 189 Wn.2d at 390*. "A statute is ambiguous if 'susceptible to two or more reasonable **[***8]** interpretations,' but 'a statute is not ambiguous merely because different interpretations are conceivable.'" *HomeStreet, Inc. v. Dep't of Revenue, 166 Wn.2d 444, 452, 210 P.3d 297 (2009)* (quoting **[*695]** *State v. Hahn, 83 Wn. App. 825, 831, 924 P.2d 392 (1996)*). "Whenever possible, statutes are to be construed so 'no clause, sentence or word shall be superfluous, void, or insignificant.'" *HomeStreet, Inc., 166 Wn.2d at 452* (internal quotation marks omitted) (quoting *Kasper v. City of Edmonds, 69 Wn.2d 799, 804, 420 P.2d 346 (1966)*).

II. LOCAL GOVERNMENT ACCOUNTING STATUTE[4]

---

[3] *RCW 43.09.210(3)* provides that "no department, public improvement, undertaking, institution, or public service industry shall benefit in any financial manner whatever by an appropriation or fund made for the support of another."

Tacoma City Charter art. IV, § 4.5 provides that "[t]he funds of any utility shall not be used to make loans to or purchase the bonds of any other utility, department, or agency of the City."

[4] The parties spend a considerable amount of time arguing whether the Ratepayers' current claims are barred by res judicata arising from the 1990s declaratory judgment action or whether collateral estoppel bars the relitigation of any previously decided issues. Because we decide the case on the merits, we need not resolve the issue of whether the declaratory judgment action has preclusive effect on the current issues.

¶23 The City argues that Click!'s financial structure does not violate the local government accounting statute, RCW 43.09.210.

¶24 The Ratepayers argue that Click! violates the statute because it is a separate "undertaking" from Tacoma Power and thus must be funded separately. We agree with the City.

WA[1] [1] ¶25 The local government accounting statute "prohibits one government entity from receiving services from another government entity for free or at reduced cost absent a specific statutory exemption." Okeson v. City of Seattle, 150 Wn.2d 540, 557, 78 P.3d 1279 (2003) (*Okeson* I). The statute provides:

> All service rendered by, or property transferred from, one department, public improvement, undertaking, institution, or public service industry to another, shall be paid for at its true and full value by the department, public improvement, undertaking, institution, or public service industry receiving the same, and no department, public improvement, undertaking, institution, **[***9]** or public service industry shall benefit in any financial manner whatever by an **[**1165]** appropriation or fund made for the support of another.

RCW 43.09.210(3).
[*696]

¶26 The parties dispute whether Tacoma Power's electric utility and Click! are separate "undertakings." Neither case law[5] nor dictionary definitions[6] are particularly illuminating.

WA[2] [2] ¶27 However, we rely on the principle of noscitur a sociis, which explains that "a single word in a statute should not be read in isolation." State v. Roggenkamp, 153 Wn.2d 614, 623, 106 P.3d 196 (2005). Instead, "'the meaning of words may be indicated or controlled by those with which they are associated.'" State v. Jackson, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999) (quoting Ball v. Stokely Foods, Inc., 37 Wn.2d 79, 87-88, 221 P.2d 832 (1950)).

¶28 Accordingly, we read the term "undertaking" in the context of the other terms listed in the statute to determine whether Click! and Tacoma Power's electric utility are separate undertakings. We conclude they are not.

WA[3] [3] ¶29 The Ratepayers encourage a broad reading of the term undertaking. However, their reading would make any different use of the existing infrastructure a separate undertaking under the accounting statute. Thus, if we adopted the Ratepayers' reading of the term undertaking, then that term would subsume every other term in the list. We interpret **[***10]** statutes to avoid such a result. HomeStreet, Inc., 166 Wn.2d at 452. Instead, we read the term undertaking in the context of the other terms listed, but we also give it and the other terms in the statute their own meaning.

¶30 Therefore, we agree with the dissent to the extent it argues that the term undertaking must have a different meaning than the other terms listed in the statute.
[*697]

WA[4] [4] ¶31 However, we disagree with the conclusion the dissent reaches. A separate project carried out by an entity can constitute a separate undertaking but not a separate department, public improvement, institution, or public service industry. But here, Click! is simply using the excess capacity of the electric utility's existing infrastructure. When reading the entire list in context, it is clear that providing an additional service using the utility's existing infrastructure is not a separate undertaking.

¶32 The whole telecommunications system is just one network of wires. Additionally, in deciding to implement the system, the City focused on the benefits that Tacoma Power would receive with regard to electric generation, transmission, and distribution. The system's potential cable TV and internet service capabilities were incidental and merely a way **[***11]** to maximize the new technology's potential. That structure has not changed. As such, Click! simply runs on the excess capacity of Tacoma Power's telecommunications system, a system that, as discussed above, was designed and implemented to maximize electric utility

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[5] The City relies on Rustlewood Ass'n v. Mason County, 96 Wn. App. 788, 981 P.2d 7 (1999), to support its argument. The Ratepayers rely on the *Okeson* line of cases. Okeson v. City of Seattle, 159 Wn.2d 436, 150 P.3d 556 (2007) (*Okeson* III); Okeson I, 150 Wn.2d 540; Okeson v. City of Seattle, 130 Wn. App. 814, 125 P.3d 172 (2005) (*Okeson* II). However, neither line of cases is controlling nor do we find the cases persuasive.

[6] An undertaking is "the act of one who undertakes or engages in a project or business." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2491 (2002). "Undertake" is defined as "to take in hand," to "enter upon," or to "set about." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 2491.

functionality. Therefore, we conclude that Click! and Tacoma Power's electric utility are one undertaking for purposes of RCW 43.09.210(3).

III. TACOMA CITY CHARTER

WA[5][↑] [5] ¶33 The City argues that Click!'s financial structure does not violate Tacoma City Charter art. IV, § 4.5 because Click! and Tacoma Power are not separate "utilities." We agree.

¶34 Article IV of the Tacoma City Charter governs public utilities. The Charter generally grants the City "all the powers granted to cities by state law to … operate … public utilities for supplying water, light, heat, power, transportation, and sewage and refuse **[**1166]** collection, treatment, and disposal **[*698]** services." TACOMA CITY CHARTER art. IV, § 4.1. Besides certain exceptions, the City cannot grant "any franchise, right or privilege to sell or supply water or electricity within the City of Tacoma." TACOMA CITY CHARTER art. IV, § 4.7. "Insofar as is possible and administratively feasible, each utility shall be operated as **[***12]** a separate entity." TACOMA CITY CHARTER art. IV, § 4.20. Additionally,

> The revenue of utilities owned and operated by the City shall never be used for any purposes other than the necessary operating expenses thereof, including … the making of additions and betterments thereto and extensions thereof, and the reduction of rates and charges for supplying utility services to consumers. The funds of any utility shall not be used to make loans to or purchase the bonds of any other utility, department, or agency of the City.

TACOMA CITY CHARTER art. IV, § 4.5. "Where common services are provided, a fair proportion of the cost of such services shall be assessed against each utility served." TACOMA CITY CHARTER art. IV, § 4.20.

¶35 The parties dispute whether Click! is separate "utility" from Tacoma Power's electric utility or whether it is simply a "betterment" of the utility.

¶36 The City designed and implemented the telecommunications system to facilitate Tacoma Power's ability to distribute electricity effectively and efficiently. That it could also be used in the manner in which Click! currently operates was only incidental and was a way to maximize the system's benefits. In other words, Click! was clearly intended **[***13]** as a betterment to Tacoma Power's telecommunications system in an effort to maximize a resource and "reduc[e] … rates and charges." TACOMA CITY CHARTER art. IV, § 4.5. That structure has not changed.

¶37 The fact that Click! is currently not independently profitable does not necessarily render it no longer a betterment. Rather, the City is attempting to maximize use of its resource, the telecommunications system, by utilizing the **[*699]** system's excess capacity to sell cable TV and internet service.[7] Because Click! is a betterment of Tacoma Power, we conclude that it does not violate the Tacoma City Charter.

¶38 We reverse.

GLASGOW, J., concurs.

Dissent by: FEARING

Dissent

¶39 FEARING, J. (dissenting) — Based on the common understanding of the relevant statutory terms, based on the purposes behind the local government accounting statute, and based on Washington decisions that prohibit a city electrical utility from engaging in activities other than distribution of electricity, I conclude that, for purposes of RCW 43.09.210(3), the conveyance **[***14]** of Internet service and the delivery of cable television service constitutes separate undertakings and entails distinct industries from the generation and distribution of electrical power. Because ratepayers of the city of Tacoma's electrical utility must, under current practices, subsidize the distinct endeavors of Internet service access and cable television delivery, Tacoma must cease these unprofitable activities or at least stop charging expenses of such services to ratepayers. Therefore, I respectfully dissent. I would affirm the trial court's grant of summary judgment to Edward Coates against the city of Tacoma.

¶40 For someone not knowledgeable about buried cables and sunken transmission lines, the facts of this appeal sometimes tumble into the murky underground. Tacoma Power, an arm of the city of Tacoma, constructed a hybrid fiber-coaxial telecommunications system to modernize and interconnect Tacoma Power's electrical generation, distribution, and transmission assets. A hybrid fiber-coaxial system consists of a broadband network that combines optical fiber and

[7] Whether Click!'s continued operation is sound business practice or good policy is not a decision for this court.

coaxial cable. The fiber portion of Tacoma **[*700]** Power's system improved electrical generation and distribution. The coaxial **[***15]** cable supported "smart-metering," a term for promoting efficient **[**1167]** electrical connection, disconnection, and billing.

¶41 The hybrid fiber-coaxial lines held additional capacity or load to support other uses. Tacoma Power sought to increase revenue utilizing the hybrid fiber-coaxial system by selling cable television and Internet access. Tacoma Power created a punctuated subunit, "Click!," for the purpose of marketing cable and Internet.

¶42 Click! began with Ordinance 25930 adopted by the Tacoma City Council in 1996. The tedious, but important, ordinance reads, in part:

> ORDINANCE NO. 25930
>
> AN ORDINANCE of the City of Tacoma, Washington establishing a telecommunications system as part of the Light Division [former name of Tacoma Power], supplementing Ordinance No. 23514 and providing for the issuance and sale of the City's Electric System Revenue Bonds in the aggregate principal amount of not to exceed $1,000,000 to provide part of the funds necessary for the acquisition, construction and installation of additions and improvements to the telecommunications system.
>
> WHEREAS, the City of Tacoma (the "City") owns and operates an electric utility system (the "Electric System"); and
>
> WHEREAS, **[***16]** the Ordinance provides that the City may *create a separate system as part of the Electric System and pledge that the income of such separate system be paid into the Revenue Fund*; and
>
> WHEREAS, *RCW 35A.11.020* authorizes the City to operate and supply utility and municipal services commonly or conveniently rendered by cities or towns; and
>
> WHEREAS, *RCW 35.92.050* authorizes cities to construct and operate works and facilities for the purpose of furnishing any persons with electricity and other means of power and to regulate and control the use thereof or lease any equipment or accessories necessary and convenient for the use thereof; and
>
> **[*701]** WHEREAS, the Utility Board and the Council have determined that it is in the best interest of the City that it install a telecommunications system among all of its Electric System substations in order to improve communications for automatic substation control; and
>
> WHEREAS, the City has determined that it is prudent and economical to provide additional capacity on such telecommunications system to provide the Electric System with sufficient capacity to perform or enhance such functions as automated meter reading and billing, appliance control, and load shaping; and
>
> WHEREAS, the Light Division **[***17]** may wish to connect such telecommunications system to individual residences and businesses in its service area or to other providers of telecommunications services; and
>
> WHEREAS, the City has determined that it should *create a telecommunications system as part of the Electric System* in order to construct these telecommunications improvements; and
>
> … .
>
> WHEREAS, after due consideration, it appears to the City Council and the Public Utility Board (the "Board") that it is in the best interest of the City to create and construct a telecommunications system and to issue Electric System Revenue Bonds to finance a portion of the costs of such construction and that the exact amount of Bonds and terms of the Bonds shall be determined by resolution of the Council … .
>
> … .
>
> ARTICLE II
> FINDINGS; ESTABLISHMENT OF THE TELECOMMUNICATIONS PROJECT AS A SEPARATE SYSTEM; AND ADOPTION OF PLAN AND SYSTEM
>
> Section 2.1. Establishment of Telecommunication System. The City hereby creates a *separate system of the City's Light Division* [former name of Tacoma Power] to be known as the telecommunications system (the "Telecommunications System"). The public interest, welfare, convenience and necessity require the creation of **[***18]** the Telecommunications System contemplated **[*702]** by the plan adopted by Section 2.2 hereof, for the purposes set forth in

Exhibit A. The City hereby covenants that all revenues received from the Telecommunications **[**1168]** System shall be deposited into the Revenue Fund.

Section 2.2. Adoption of Plan: Estimated Cost. The City hereby specifies and adopts the plan set forth in Exhibit A for the acquisition, construction and implementation of the Telecommunications System (the "*Telecommunications Project*"). The City may modify details of the foregoing plan when deemed necessary or desirable in the judgment of the City. The estimated cost of the Telecommunications Project, including funds necessary for the payment of all costs of issuing the Bonds, is expected to be approximately $40,000,000.

Section 2.3. Findings of Parity. The Council hereby finds and determines as required by Section 5.2 of the Ordinance as follows:

A. The Bonds will be issued for financing capital improvements to the Electric System.

… .

EXHIBIT A

TELECOMMUNICATIONS PROJECT

The Telecommunications Project will include some or all of the following elements:

Infrastructure improvements

Construct a hybrid fiber coax[ial] ("HFC") telecommunications infrastructure consisting of fiber optic **[***19]** rings and branches connecting nodes throughout the Light Division service area. This telecommunications system will be asymmetrically two-way capable. It will interconnect all Light Division substations. Connections may also be made with Light Division customers and with other providers of telecommunications infrastructure and services. This telecommunications system will have 500 channels. …

Functions to be performed by infrastructure improvements

Through construction of the HFC telecommunications system, the Light Division's Telecommunications System will be capable of performing some or all of the following functions:

• conventional substation communications functions

[*703] • automated meter reading (electric and water)

• automated billing (electric and water)

• automated bill payment (electric and water)

• demand side management (DSM) functions, such as automated load (e.g. water heater) control

• provision of information to customers that is relevant to their energy and water purchasing decisions (e.g. information on time-of-use or "green" power rates)

• distribution automation

• remote turn on/turn off for electric and water customers

• city government communications functions

• CATV [cable **[***20]** television] service

• transport of signals for service providers offering telecommunications services (e.g. Personal Communications Service (PCS), video on demand, high speed data, as well as conventional wired and wireless telecommunications services)

• Internet access service

Clerk's Papers (CP) at 122-24, 126, 145 (emphasis added) (some formatting omitted). Note that the ordinance established "a separate [telecommunications] system as part of the Electric System." CP at 122. The first nine functions listed in exhibit A of the ordinance apply to the city's electrical utility. The last three functions apply to cable television and Internet service delivery.

¶43 In 1996, before laying the new hybrid fiber-coaxial telecommunications system, the city of Tacoma filed a declaratory judgment action in superior court seeking confirmation of the legality of Ordinance 25930. Tacoma sought declarations that:

b. The Bond ordinance was properly enacted.

c. The City has authority … to utilize the Telecommunications System to provide cable television service in the [Tacoma Power] service area.

[*704] d. The City has authority … to lease Telecommunications System facilities and capacity to telecommunications providers [sell internet service to internet service providers].

e. The City has authority **[***21]** … to issue the Bonds for the purposes set for in **[**1169]**

> paragraphs (c) and (d) above and in the manner set forth in the Bond Ordinance.

CP at 714.

¶44 During the 1996 lawsuit, the city of Tacoma moved for summary judgment. Ratepayers opposed the motion and argued that the plan adopted by the ordinance was ambiguous and could potentially lose money. Ratepayers lamented that, as described in the ordinance, the system's financial structure would make Tacoma Power, and ultimately Tacoma Power ratepayers, liable for any losses accrued. They argued that this structure violated section 4.2 of the Tacoma City Charter. Ratepayers also expressed concern that funding for the hybrid fiber-coaxial project would come not only from Tacoma Power's revenue but also from the City's general obligation fund and thus would subject the taxpayers of Tacoma to potential tax increases in violation of section 4.2.

¶45 The superior court, in the 1996 suit, initially granted the City's motion for summary judgment except on one question. In the initial award of judgment, the superior court ruled, in part, that the City had the legal authority to sell cable television service and access to broadband for Internet service providers. The court reserved a decision on the question **[***22]** of whether the City held authority to issue the revenue bonds.

¶46 In 1997, the City moved again for summary judgment on the question of authority to issue the bonds to finance the hybrid fiber-coaxial project. Ratepayers opposed the renewed motion and forwarded similar arguments to those raised previously. This time, ratepayers' experts opined that the "proposal represents a great financial risk and will cause a general indebtedness to the taxpayers **[*705]** and ratepayers of Tacoma that could only be paid by increasing the rates charged to the ratepayers … for utilities or borrowing from the [City's] general fund." CP at 823. In other words, ratepayers argued that, because of uncertainty in the hybrid fiber-coaxial project's profitability, genuine issues of fact precluded granting summary judgment.

¶47 Tacoma replied by arguing that it would retire the bonds solely from Tacoma Power's revenue, not the City's general obligation fund. Thus, city taxes would not increase and, as a result, section 4.2 of the Tacoma City Charter did not apply. Tacoma also argued that the question of whether the City would increase electricity rates to Tacoma Power ratepayers lacked relevance to the validity of the bonds and, in turn, **[***23]** to the merits of the summary judgment motion. Tacoma wrote in a reply summary judgment brief:

> [The Ratepayers'] brief also argues extensively that revenues from the Telecommunications System may be inadequate to cover debt service on the Bonds. This factual argument is simply not material to the question of the City's authority to issue the Bonds, and therefore cannot raise a "genuine issue as to any *material* fact[.]" Moreover, the issue is outside of the scope of the Court's review.

CP at 834 (second alteration in original) (citation omitted). In other words, Tacoma contended that the superior court should not address the profitability, or lack thereof, of Click!.

¶48 At the conclusion of the 1996 suit, the superior court granted the City's summary judgment motion and ruled that Tacoma possessed authority to issue $1 million of revenue bonds to partly finance the hybrid fiber-coaxial telecommunications system. The court handwrote the following into its May 9, 1997 summary judgment order: "however, the Court is making no finding as to the financial feasibility of the Project or as to the legality of any future bond issues." CP at 848. Ratepayers did not appeal.

¶49 **[*706]** In 1997, the Tacoma City Council adopted **[***24]** Substitute Resolution 33668, which also addressed the new hybrid fiber-coaxial system. The resolution declares, in part:

> WHEREAS the City of Tacoma, Department of Public Utilities, Light Division [Tacoma Power] desires to: (1) develop a state-of-the art fiber optic system to support enhanced electric system control, reliability and efficiency; … (3) create greater revenue diversification through *new* ***[**1170]*** *business lines (i.e. internet transport, cable TV*, etc.).

CP at 153 (emphasis added).

¶50 As a result of the superior court's ruling in the 1996 declaratory judgment suit, Tacoma constructed and implemented the hybrid fiber-coaxial telecommunications system. Through this system, Click! delivers cable television directly to customers. Click! sells access to its hybrid fiber-coaxial broadband transmission lines for purposes of Internet service providers' marketing Internet service to the providers' customers.

¶51 The city of Tacoma intended for Click! to operate independently of the other subdivisions of Tacoma Power. According to one expert, cable television and the Internet do not support the functions of an electrical

utility. As stated during oral argument, distribution of cable television and Internet **[***25]** distribution does not employ the same cables or wires as those used for transmission of electricity. Wash. Court of Appeals oral argument, *Coates v. City of Tacoma*, No. 51695-1-II (Sept. 9, 2019), at 22 min., 35 sec. through 23 min., 20 sec. (on file with court).

¶52 Although Tacoma Power initially intended the hybrid fiber-coaxial telecommunications system to be used for smart-metering, the electrical industry switched to using wireless meters. Tacoma Power stopped installing smart meters through the hybrid fiber-coaxial system in 2009 and stopped replacing existing wired meters in 2015. As of February 2018, 14,240 smart meters remained functioning.

¶53 Tacoma originally planned for 45,000 Click! customers. The number of customers peaked in 2010 at 25,000. By **[*707]** late 2014, the customers had steadily declined to 20,000. At that time, Click! provided cable service to only 17.5 percent of the homes it passed. The number of customers was projected to continue to decline.

¶54 The city of Tacoma's Power Fund accounts for the expenses and revenues of Tacoma Power. The Power Fund accounts separately for subunits of Tacoma Power, including the maintenance of a Click! subfund. This separate accounting has enabled **[***26]** the City to discern that Click! operates at a deficit. Click! loses around $5 million each year. Click! annually incurs millions of dollars of expenses related only to its operations, such as installing cable boxes, processing bills, and subscribing to programming. The Power Fund accounting also assigns to Click! shared expenses with the electrical utility such as the cost of the building in which the subunits office. Because of the losses, Tacoma Power electricity ratepayers subsidize the operations of Click!.

¶55 In 2014, the Tacoma City Council contracted with an outside firm to conduct a general management review. The review viewed Tacoma Power and Click! as functionally different entities. The review found that Click! was not independently profitable and, as a result of the Tacoma Power and Click! revenue sharing financial structure, Tacoma Power ratepayers subsidized Click! The review deemed the subsidies unfair.

¶56 On July 16, 2015, Tacoma City Attorney Elizabeth Pauli and Chief Deputy City Attorney William Fosbre wrote a memorandum concluding that Tacoma Power unlawfully operated Click! because of its lack of a nexus to the City's electrical utility and because of the deficit spending. **[***27]** The memorandum opined:

> City electric utility revenues may be used to maintain the telecommunication system while it is being used to provide electric utility services to electric customers.
>
> City electric utility revenues may not be used to pay for the costs directly associated (such cable programming, set top **[*708]** boxes, marketing, etc.) with providing commercial telecommunications services (cable television and wholesale broadband Internet) to the public. These costs are not sufficiently related to providing electricity to utility customers, thus must be paid for from non-utility revenues. Non-utility revenues can include rates or charges to the telecommunication services customers or general government tax dollars. General government tax dollars can be used to offset the costs of providing municipal services (think theater district, Tacoma Dome, etc.).

CP at 62-63.

¶57 This court must decide whether Tacoma may require electricity ratepayers to underwrite Click!. Although Edward Coates **[**1171]** also argues that Click! violates section 4.2 of the Tacoma City Charter, I rely exclusively on the local government accounting statute, *RCW 43.09.210*, to answer in the negative.

¶58 *RCW 43.09.210* declares in part:

> (2) Separate accounts shall be kept for each department, **[***28]** public improvement, undertaking, institution, and public service industry under the jurisdiction of every taxing body.
>
> (3) All service rendered by, or property transferred from, one department, public improvement, undertaking, institution, or public service industry to another, shall be paid for at its true and full value by the department, public improvement, undertaking, institution, or public service industry receiving the same, and no department, public improvement, undertaking, institution, or public service industry shall benefit in any financial manner whatever by an appropriation or fund made for the support of another.

I focus on the latter half of *RCW 43.09.210(3)*, which reads:

> [*N*]*o* department, public improvement,

> *undertaking*, institution, or *public service industry shall benefit in any financial manner whatever by an appropriation or fund made for the support of another*.

(Emphasis added.) This appeal compels us to decide what constitutes an "undertaking" and a "public service industry" **[*709]** for purposes of the statute. We must discern whether Internet service and cable television, on the one hand, constitute discrete undertakings or distinct industries from electricity distribution.

¶59 The city of Tacoma **[***29]** focuses only on one word, "undertaking," when arguing the subsidies afforded Click! by electrical ratepayers conforms with *RCW 43.09.210(3)*. Tacoma contends that we should construe the term "undertaking" as being similar in nature to the other nouns found in the statute: department, public improvement, institution, and public service industry. Tacoma reasonably contends that, if the word "undertaking" does not echo the meaning of the other words, the term "undertaking" would subsume the entire statute. Stated differently, the legislature could have merely inserted the noun "undertaking" into the statute without including the words "department," "public improvement," "institution," or "public service industry" and convey the same meaning as the meaning of the statute with the additional nouns included.

¶60 Tacoma relies on the rule of statutory construction that teaches a court not to read in isolation a single word. *Jongeward v. BNSF Railway Co., 174 Wn.2d 586, 601, 278 P.3d 157 (2012)*. Instead, associated words placed in the statute control the meaning of a word. *Cito v. Rios, 3 Wn. App. 2d 748, 759, 418 P.3d 811*, *review denied*, *191 Wn.2d 1017, 426 P.3d 747 (2018)*. But one can generally find a principle of interpretation that supports one's reading of a statute.

¶61 Another principle of statutory interpretation instructs the court to construe a statute to give **[***30]** effect to all the language used and avoid a construction that would render a portion of a statute meaningless or superfluous. *Ford Motor Co. v. City of Seattle, 160 Wn.2d 32, 41, 156 P.3d 185 (2007)*. Presumably, according to this principle, we must identify at least one example where the word "undertaking" covers some municipal endeavor not covered by the other nouns. The city of Tacoma supplies us no such example. Instead, **[*710]** if we limited the word "undertaking" to cover only the same nouns in *RCW 43.09.210(3)*, we would render nugatory a key word of the statute. Tacoma jettisons the word "undertaking" from the local government accounting statute.

¶62 *RCW 43.09.210* does not define any of the nouns catalogued in *subsection (3)*. So I rely in part on a legal dictionary and a lay dictionary to discern the parameters of the word "undertaking" and the phrase "public service industry." A court may employ a standard English dictionary to determine the plain meaning of an undefined term. *State v. Fuentes, 183 Wn.2d 149, 160, 352 P.3d 152 (2015)*. A court may also utilize a legal dictionary. *State v. McNally, 361 Or. 314, 322, 392 P.3d 721 (2017)*; *Upshaw v. Superior Court, 22 Cal. App. 5th 489, 504, 231 Cal. Rptr. 3d 505 (2018)*.

¶63 *Black's Law Dictionary* defines "undertaking," but only in the context of a pledge for financing. BLACK'S LAW DICTIONARY 1837 (11th ed. 2019). *Merriam-Webster* defines "undertaking" as:

> **[**1172] 1 a :** the act of one who undertakes or engages in a project or business …
>
> … .
>
> **2 :** something undertaken **:** ENTERPRISE.

MERRIAM-WEBSTER ONLINE **[***31]** DICTIONARY, https://www.merriam-webster.com/dictionary/undertaking (last visited Nov. 26, 2019).

¶64 Assuming "undertaking" is synonymous with "enterprise," one might consider the hybrid fiber-coaxial transmission lines to constitute one enterprise, of which the smart-metering, cable television, and Internet are subparts. But that analysis falls short when considering that Click! is a separate business from the electrical distribution. Smart meters constitute only a portion of the facilities and technology used to operate Tacoma's electrical utility. Tacoma Power does not employ the hybrid fiber-coaxial telecommunications **[*711]** system to deliver electricity to its customers. Tacoma Power bills for electricity consumed by customers separately from cable television subscriptions and access to the cables for Internet service providers. The assessment of one enterprise further disassembles when contemplating that Tacoma Power is diminishing, if not ending, the smart-metering portion of the hybrid fiber-coaxial cable system.

¶65 Since the term "public service industry" includes three words, the lay dictionary does not define the phrase. *Black's Law Dictionary* omits any definition of "public service industry," **[***32]** but defines constituent parts of the term. The legal dictionary defines "public

service" in relevant part as:

> 1. A service provided or facilitated by the government for the general public's convenience and benefit.

BLACK'S LAW DICTIONARY at 1488. Cable television and Internet is not provided by the government for the public's convenience and benefit. Electricity is. *Black's Law Dictionary* defines "industry" in relevant part as:

> 3. A particular form or branch of productive labor; an aggregate of enterprises employing similar production and marketing facilities to produce items having markedly similar characteristics.

BLACK'S LAW DICTIONARY at 927. An electrical utility does not produce a product markedly similar to cable television and Internet.

¶66 In addition to reading dictionaries, I consider how legal settings utilize the term "public service industry." The law has considered public service industries to include railroads and bus systems. *Florida Power Corp. v. Webster, 760 So. 2d 120, 125 (Fla. 2000)*; *City of Buffalo v. State Board of Equalization & Assessment, 44 Misc. 2d 716, 718, 254 N.Y.S.2d 699 (Sup. Ct. 1964)*; *California Motor Transport Co. v. Railroad Commission, 30 Cal. 2d 184, 187-88, 180 P.2d 912 (1947)*; *Sale v. Railroad Commission, 15 Cal. 2d 612, 617-18, **[*712]** 104 P.2d 38 (1940)*. The California Supreme Court impliedly deemed a county's water system to represent a public service industry. *County of Inyo v. Public Utilities Commission, 26 Cal. 3d 154, 158, 604 P.2d 566, 161 Cal. Rptr. 172 (1980)*. One court labeled an electric light plant as a public service industry. *Consolidated Gas, Electric Light & Power Co. of Baltimore v. City of Baltimore, 130 Md. 20, 99 A. 968, 972 (1917)*. No court has labeled cable television or **[***33]** Internet service as a public service industry. Cable television is generally owned by private enterprise. Internet service providers are also usually private companies.

¶67 The word "industry" is commonly used without the appendage "public service." One law review article references the telecommunications industry as a distinct industry and electrical utilities as another distinct industry. William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426, 512, 516 (1979). One sometimes hears the term "cable television industry." Karl Bode, *The* Cable Industry *Makes $28 Billion Annually in Bull*[****] *Fees*, TECHDIRT (Oct. 9, 2019 6:23 AM) (emphasis added), https://www.techdirt.com/articles/20191008/08474843146/cable-industry-makes-28-billion-annually-bullshit-fees.shtml; Kristina Zucchi, *5 Reasons the* Cable TV Industry *Is Dying*, INVESTOPEDIA (emphasis added), https://www.investopedia.com/articles/personal-finance/062315/5-reasons-cable-tv-industry-dying.asp (last updated June 25, 2019). One never hears the appellation "cable television and electrical industry."

¶68 One article describes the Internet industry:

> **[**1173]** The *Internet Industry* consists of companies that provide a wide variety **[***34]** of products and services primarily online through their Web sites. Operations include, but are not limited to, search engines, retailers, travel services, as well as dial-up and broadband access services.

[*713] *Industry Overview: Internet*, VALUE LINE (emphasis added), *http://www.valueline.com/Stocks/Industries/Industry_Overview__Internet.aspx#.XaISHmzn-Uk* (last visited Nov. 26, 2019). The article does not mention power generation or electrical distribution as being a product or service of the Internet.

¶69 The Washington Supreme Court, in *City of Issaquah v. Teleprompter Corp., 93 Wn.2d 567, 574-75, 611 P.2d 741 (1980)*, recognized cable television as a service distinct from a city's electrical utility. The court favorably quoted a cable company's attorney as characterizing cable television as a luxury service and a television improvement. *93 Wn.2d at 574*.

¶70 One Washington statute, *RCW 80.04.010(23)*, defines a "public service company," rather than "public service industry." The statute's definition includes an "electrical company" and a "telecommunication company." But *RCW 80.04.010* defines those two companies separately as if unrelated to one another. *RCW 80.04.010(12)*, *(28)*.

¶71 I note that Tacoma Power separately accounts for the expenses and revenue of Click!. *RCW 43.09.210(2)* requires separate accounts for "each department, public improvement, understanding, **[***35]** institution, and public service industry." This separate accounting for Click! may illustrate Tacoma's understanding that Internet service and cable television involve distinct undertakings.

¶72 Ordinance 25930 recognized Click! as a distinct entity when it labeled Click! as "a separate system" within the Tacoma Power system. CP at 126, § 2.1. The

follow-up resolution in 1997 described the new, separate system's Internet transport and cable TV services as "new business lines," i.e., different business lines from the electric utility's traditional business of supplying electricity to customers. CP at 153.

¶73 I now leave the minutiae of the wording found in RCW 43.09.210(3) and review the broad policy behind the **[*714]** local government accounting statute. Ultimately, in resolving the meaning of a statutory term, we adopt the interpretation that best advances the legislative purpose. *Citizens Alliance for Property Rights Legal Fund v. San Juan County, 184 Wn.2d 428, 437, 359 P.3d 753 (2015)*.

¶74 The Washington State Legislature enacted the local government accounting statute and the forerunner to RCW 43.09.210 in 1909 at the height of America's progressive era. LAWS OF 1909, ch. 76, § 3. We generally think of this era as influencing national policy, but the era engendered significant improvements to local and state government. The progressive movement sought to **[***36]** rid state and local government of political corruption and to render government efficient, goals that all points on the political spectrum can support. Progressive adherents lamented the waste and inefficiency at all levels of government.

¶75 Progressive era reforms included sound accounting standards essential for better government. James L. Chan & Qi Zhang, *Government Accounting Standards and Policies*, *in* THE INTERNATIONAL HANDBOOK OF PUBLIC FINANCIAL MANAGEMENT 742 (Richard Allen et al. eds., 2013). During the first decade of the 1900s, the Grange promoted before state legislatures a uniform public accounting act, portions of which became Washington's local government accounting act. Ed. F. Green, *The Kansas State Grange Moving for Uniform Public Accounting*, 10 PUB. POL'Y 22 (1904); *see also* *City of Cincinnati v. Board of Education, 30 Ohio N.P. (n.s.) 595, 601 (C.P. Hamilton County 1933)* (referencing Ohio General Code § 280: "No institution, department, improvement or public service industry shall receive financial benefit from any appropriation made or fund created for the support of another."). The uniform act promoted "the economy and efficiency in all branches of public business, so that the **[***37]** expenditures of public funds shall be placed on a systematic basis and be controlled by honest methods, in according with public needs." Green, **[**1174]** *supra*, at 22 (1904).

¶76 Click! flouts the spirit of RCW 43.09.210 by subsuming the costs of a losing undertaking in the cost of operating **[*715]** a vital service to the residents of Tacoma. The accounting demanded by RCW 43.09.210 has unearthed government inefficiency and should lead to the ending of a wasteful project. Characterizing Click! as the same undertaking or public service industry as the electrical utility allows a pet project of some politicians to survive despite its onus on electricity ratepayers. The onus particularly inflicts economic harm on the poor since Tacoma Power enjoys a monopoly when transmitting electricity, an essential service for all residents of Tacoma, and the poor pay a higher percentage of their income on utilities.

¶77 Click! also offends Washington case law that holds a city's electrical utility may not engage in endeavors other than the sale of electricity. Since 1890, cities have held **[***38]** statutory power to operate an electrical utility. *City of Tacoma v. Taxpayers of Tacoma, 108 Wn.2d 679, 695-96, 743 P.2d 793 (1987)*. The legislature believed that a municipality could provide lower cost and more efficient electrical service. *City of Tacoma v. Taxpayers of Tacoma, 108 Wn.2d at 696*. Municipal ownership of electrical distribution seeks to give the citizen the best possible service at the lowest possible price. *Uhler v. City of Olympia, 87 Wash. 1, 14, 151 P. 117, 152 P. 998 (1915)*. Accordingly, a municipal utility has a duty to provide low cost, efficient service. *City of Tacoma v. Taxpayers of Tacoma, 108 Wn.2d at 696*. Additionally, a municipal electric utility may not impose on ratepayers the costs of activities that do not have a "sufficiently close nexus" to the utility's primary purpose of "supplying electricity to the municipal corporation and its inhabitants." *City of Tacoma v. Taxpayers of Tacoma, 108 Wn.2d at 695-96*.

¶78 A series of Washington decisions precludes a city's electrical utility from charging ratepayers for extraneous endeavors. In *Okeson v. City of Seattle, 150 Wn.2d 540, 78 P.3d 1279 (2003)* (*Okeson* I), the Washington Supreme Court ruled that the city's imposition on electric utility customers of a rate or other charge for the maintenance and operation **[*716]** of streetlights was an unauthorized tax. The city's electric utility serves a proprietary function of the government. Therefore, the electric utility operates for the benefit of its customers, not the general public. Providing streetlights was a governmental function unrelated to the electric **[***39]** utility.

¶79 The Washington State Legislature legislatively overruled *Okeson* I. LAWS OF 2002, ch. 102, § 1. But its main holding of prohibiting unrelated services remains true.

¶80 In Okeson v. City of Seattle, 130 Wn. App. 814, 125 P.3d 172 (2005) (*Okeson* II), the high court held that electric utility revenues could not be used to pay for public art not directly related to the utility. In Okeson v. City of Seattle, 159 Wn.2d 436, 150 P.3d 556 (2007) (*Okeson* III), the high court held that electric utility revenues could not be used to pay other parties for mitigating their greenhouse gas emissions, as part of the city's program to combat global warming. If a city electrical utility cannot charge its ratepayers for the beneficial effects of reducing greenhouse gases, this court should not allow Tacoma Power to charge its ratepayers for underwriting a flopping cable television and Internet system.

¶81 Smith v. Spokane County, 89 Wn. App. 340, 948 P.2d 1301 (1997), bears some resemblance. Sandra Smith filed an action against Spokane County and the city of Spokane challenging the fees imposed on water and sewer customers within the Spokane-Rathdrum Aquifer Protection Area. Division Three of this court relied on the local government accounting statute and considered the aquifer protection activities a separate undertaking from the provision of water and sewer. Therefore, under RCW 43.09.210 the city and county could not charge **[***40]** utility customers for the activities.

¶82 The city of Tacoma relies principally on Rustlewood Association v. Mason County, 96 Wn. App. 788, 981 P.2d 7 (1999). *Rustlewood Association* helps Tacoma none. This court, in *Rustlewood Association*, addressed whether costs **[*717]** needed to be allocated among different residential subdivisions served by the same utility. In contrast, Tacoma's **[**1175]** appeal concerns the allocation of expenses between an electric utility and distinct business lines.

¶83 The city of Tacoma may rely on the fact that Click! uses the same hybrid fiber-coaxial system as the electrical distribution system such that cable television, Internet, and electricity distribution entail the same undertaking and the same public service industry. Nevertheless, RCW 43.09.210 does not suggest that, because two endeavors entail overlapping facilities, the two activities involve the same undertaking or industry. The electrical lines of Tacoma Power, the most essential byway of the utility, remain separate from the hybrid fiber-coaxial telecommunications system.

¶84 The city of Tacoma argues that Click!'s provision of Internet and cable television must be the same undertaking or public service industry since they operate within the same department, Tacoma Power. This argument would allow a municipality **[***41]** to avoid the strictures of RCW 43.09.210 by folding unrelated endeavors into the same department. Tacoma could operate a library inside the sewer department and charge sewer customers with the cost of the library. Tacoma's argument promotes form over substance and breaches the spirit of the local government accounting statute.

¶85 The city of Tacoma highlights that it still owns and possesses the hybrid fiber-coaxial telecommunications system. Tacoma further underscores that it only uses the system's excess capacity. Tacoma may thereby argue that, since the system exists and its excess capacity could raise revenue, the City should be permitted to operate Click!. This emphasis ignores the fact that Click!'s costs exceed the revenue accumulated by the sale of the excess capacity. The law allows Tacoma to still own and possess the system with its surplus capacity, but not to market the excess capacity at a loss. Tacoma may even operate a cable television system and allow Internet service providers access to the hybrid **[*718]** fiber-coaxial cables, but not to the detriment of electrical utility customers.

¶86 During oral argument, the city of Tacoma contended that Click! is not operated at a financial loss. Wash. Court **[***42]** of Appeals oral argument, *supra*, at 30 min., 50 sec. through 32 min., 5 sec. Nevertheless, Tacoma presented no facts, in opposition to Edward Coates's summary judgment motion, to create an issue of fact as to the profitability of Click!. Coates presented overwhelming, uncontroverted evidence of a financial loss. When questioned further during oral argument, Tacoma agreed it presented no affidavit testimony of profitability. Wash. Court of Appeals oral argument, *supra*, at 31 min., 45 sec. through 32 min., 5 sec.

¶87 The city of Tacoma also asks that this court reverse the trial court ruling on the basis of res judicata and collateral estoppel. Tacoma contends the 1996 litigation bars Edward Coates from relitigating whether Tacoma can operate Click! at a financial loss. Nevertheless, the earlier court never addressed the profitability of Click! or the impact of financial losses on Click!'s authority to conduct business. Tacoma unfairly raises issue and claim preclusion because, when ratepayers mentioned the possibility of financial losses during the **[***43]** 1996 lawsuit, the City contended that the profitability of Click! had no relevance to its declaratory judgment action.

¶88 Collateral estoppel or issue preclusion applies only when the two cases involve identical issues. Shoemaker

v. City of Bremerton, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). The 1996 litigation did not entail the same issue.

¶89 The city of Tacoma filed the 1996 lawsuit in the form of a declaratory judgment action. RCW 7.24.010 grants the superior court jurisdiction to declare the rights of parties. The statute further prescribes that:

> such declarations shall have the force and effect of a final judgment or decree.

¶90 Based on RCW 7.24.010, Tacoma argues that the same res judicata effects emanating from other lawsuit **[*719]** judgments extend to a declaratory judgment order. In turn, Tacoma emphasizes the rule that res judicata, or claim preclusion, prohibits the relitigation of claims and issues that could have been litigated in a prior action. Eugster v. Washington State Bar Association, 198 Wn. App. 758, 786, ***[**1176]*** 397 P.3d 131 (2017). Tacoma claims that ratepayers could have raised the issue of the lack of profitability during the 1996 litigation.

¶91 I question whether the ratepayers could have raised the argument of the lack of profitability of Click! during the earlier lawsuit when Tacoma contended that Click!'s profitability lacked any relevance to the claims asserted. **[***44]** The superior court in its 1997 order approving the bond issuance likely agreed since it handwrote a notation that it did not decide Click!'s profitability. Regardless, res judicata does not apply against Edward Coates because of the limited nature res judicata plays in the context of a declaratory judgment action.

¶92 No Washington decision has addressed the applicability of res judicata to an earlier declaratory judgment. Nevertheless, the universal rule declares that res judicata extends only to issues actually decided. Therefore, res judicata and collateral estoppel conflate in the context of a declaratory judgment action.

¶93 Restatement (Second) of Judgments section 33 (Am. Law Inst. 1982) declares:

> A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared, and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.

22A Am. Jur. 2d Declaratory Judgments section 244 (2013) likewise reads:

> A declaratory judgment is only a bar to matters which were actually litigated, not to those that might have been litigated. Nor is it an absolute bar to subsequent proceedings where the **[*720]** parties are seeking other remedies **[***45]** even though based on claims that could have been asserted in the original action.

¶94 Numerous state courts and federal courts have addressed the extent of res judicata in the context of declaratory judgment actions and have ruled that the doctrine extends only to issues actually litigated. States so holding have a similar statute to RCW 7.24.010 that affords declaratory orders the same status as other judgments. Jackinsky v. Jackinsky, 894 P.2d 650, 654-57 (Alaska 1995); Aerojet-General Corp. v. American Excess Insurance Co., 97 Cal. App. 4th 387, 401-03, 117 Cal. Rptr. 2d 427 (2002); Eason v. Board of County Commissioners, 961 P.2d 537, 539-40 (Colo. App. 1997); North Shore Realty Corp. v. Gallaher, 99 So. 2d 255, 256-57 (Fla. Dist. Ct. App. 1957); Stilwyn, Inc. v. Rokan Corp., 158 Idaho 833, 842-45, 353 P.3d 1067 (2015); Gansen v. Gansen, 874 N.W.2d 617, 620-23 (Iowa 2016); Bankers & Shippers Insurance Co. v. Electro Enterprises, Inc., 287 Md. 641, 652-55, 415 A.2d 278 (1980); Andrew Robinson International, Inc. v. Hartford Fire Insurance Co., 547 F.3d 48, 52-59 (1st Cir. 2008); Ganaway v. Shelter Mutual Insurance Co., 795 S.W.2d 554, 562 (Mo. App. 1990); Boca Park Marketplace Syndications Group, LLC v. Higco, Inc., 133 Nev. 923, 925-27, 407 P.3d 761 (2017); Radkay v. Confalone, 133 N.H. 294, 297-98, 575 A.2d 355 (1990); Tunis v. Country Club Estates Homeowners Association, 2014-NMCA-025, ¶¶ 1-22, 318 P.3d 713 (2013); Harborside Refrigerated Services, Inc. v. Vogel, 959 F.2d 368, 372-73 (2d Cir. 1992); In re Estate of Cox, 97 N.C. App. 312, 314-15, 388 S.E.2d 199 (1990); State ex rel. Shemo v. City of Mayfield Heights, 95 Ohio St. 3d 59, 68-69, 2002-Ohio-1627, 765 N.E.2d 345; Oklahoma Alcoholic Beverage Control Board v. Central Liquor Co., 1966 OK 243, 421 P.2d 244, 247; Catawba Indian Nation v. State, 407 S.C. 526, 539-41, 756 S.E.2d 900 (2014); Carver v. Heikkila, 465 N.W.2d 183, 186 (S.D. 1991); Martin v. Martin, Martin & ***[*721]*** Richards, Inc., 989 S.W.2d 357, 359 (1998); Cupola Golf Course, Inc. v. Dooley, 2006 VT 25, ¶ 10, 179 Vt. 427, 898 A.2d 134 (2006); Stericycle, Inc. v. City of Delavan, 120 F.3d 657, 659 (7th Cir. 1997).

Review denied at *195 Wn.2d 1025 (2020)*.

References

End of Document

APPENDIX B

RCW 35.94.010

RCW 35.94.010 Authority to sell or let. A city may lease for any term of years or sell and convey any public utility works, plant, or system owned by it or any part thereof, together with all or any equipment and appurtenances thereof. [1965 c 7 § 35.94.010. Prior: 1917 c 137 § 1; RRS § 9512. Cf. 1907 c 86 §§ 1-3; 1897 c 106 §§ 1-4. Formerly RCW 80.48.010.]

APPENDIX C

RCW 34.94.020

RCW 35.94.020 Procedure. The legislative authority of the city, if it deems it advisable to lease or sell the works, plant, or system, or any part thereof, shall adopt a resolution stating whether it desires to lease or sell. If it desires to lease, the resolution shall state the general terms and conditions of the lease, but not the rent. If it desires to sell the general terms of sale shall be stated, but not the price. The resolution shall direct the city clerk, or other proper official, to publish the resolution not less than once a week for four weeks in the official newspaper of the city, together with a notice calling for sealed bids to be filed with the clerk or other proper official not later than a certain time, accompanied by a certified check payable to the order of the city, for such amount as the resolution shall require, or a deposit of a like sum in money. Each bid shall state that the bidder agrees that if his or her bid is accepted and he or she fails to comply therewith within the time hereinafter specified, the check or deposit shall be forfeited to the city. If bids for a lease are called for, bidders shall bid the amount to be paid as the rent for each year of the term of the lease. If bids for a sale are called for, the bids shall state the price offered. The legislative authority of the city may reject any or all bids and accept any bid which it deems best. At the first meeting of the legislative authority of the city held after the expiration of the time fixed for receiving bids, or at some later meeting, the bids shall be considered. In order for the legislative authority to declare it advisable to accept any bid it shall be necessary for two-thirds of all the members elected to the legislative authority to vote in favor of a resolution making the declaration. If the resolution is adopted it shall be necessary, in order that the bid be accepted, to enact an ordinance accepting it and directing the execution of a lease or conveyance by the mayor and city clerk or other proper official. The ordinance shall not take effect until it has been submitted to the voters of the city for their approval or rejection at the next general election or at a special election called for that purpose, and a majority of the voters voting thereon have approved it. If approved it shall take effect as soon as the result of the vote is proclaimed by the mayor. If it is so submitted and fails of approval, it shall be rejected and annulled. The mayor shall proclaim the vote as soon as it is properly certified. [2009 c 549 § 2133; 1985 c 469 § 40; 1965 c 7 § 35.94.020. Prior: 1917 c 137 § 2; RRS § 9513. Cf. 1907 c 86 §§ 1-3; 1897 c 106 §§ 1-4. Formerly RCW 80.48.020.]

Elections: Title 29A RCW.

APPENDIX D

RCW 34.94.030

RCW 35.94.030 Execution of lease or conveyance. Upon the taking effect of the ordinance the mayor and the city clerk or other proper official shall execute, in the name and on behalf of the city, the lease or conveyance directed thereby. The lessee or grantee shall accept and execute the instrument within ten days after notice of its execution by the city or forfeit to the city, the amount of the check or deposit accompanying his or her bid: PROVIDED, That if litigation in good faith is instituted within ten days to determine the rights of the parties, no forfeiture shall take place unless the lessee or grantee fails for five days after the termination of the litigation in favor of the city to accept and execute the lease or conveyance. [2009 c 549 § 2134; 1965 c 7 § 35.94.030. Prior: 1917 c 137 § 3; RRS § 9514. Cf. 1907 c 86 §§ 1-3; 1897 c 106 §§ 1-4. Formerly RCW 80.48.030.]

APPENDIX E

RCW 34.94.040

RCW 35.94.040 Lease or sale of land or property originally acquired for public utility purposes. (1) Whenever a city shall determine, by resolution of its legislative authority, that any lands, property, or equipment originally acquired for public utility purposes is surplus to the city's needs and is not required for providing continued public utility service and, in the case of personal property or equipment, has an estimated value of greater than fifty thousand dollars, then such legislative authority by resolution and after a public hearing may cause such lands, property, or equipment to be leased, sold, or conveyed. Such resolution shall state the fair market value or the rent or consideration to be paid and such other terms and conditions for such disposition as the legislative authority deems to be in the best public interest.

(2) The provisions of RCW 35.94.020 and 35.94.030 shall not apply to dispositions authorized by this section. The provisions of this section and RCW 35.94.020 and 35.94.030 shall not apply to the disposition of any personal property or equipment originally acquired for public utility purposes that is surplus to the city's needs and is not required for providing continued public utility service and has an estimated value of fifty thousand dollars or less.

(3) This section does not apply to property transferred, leased, or otherwise disposed in accordance with RCW 39.33.015. [2020 c 31 § 1; 2018 c 217 § 4; 1973 1st ex.s. c 95 § 1.]

APPENDIX F

RCW 35A.80.010

RCW 35A.80.010 General laws applicable. A code city may provide utility service within and without its limits and exercise all powers to the extent authorized by general law for any class of city or town. The cost of such improvements may be financed by procedures provided for financing local improvement districts in chapters 35.43 through 35.54 RCW and by revenue and refunding bonds as authorized by chapters 35.41, 35.67 and 35.89 RCW and Title 85 RCW. A code city may protect and operate utility services as authorized by chapters 35.88, 35.91, 35.92, and 35.94 RCW and may acquire and damage property in connection therewith as provided by chapter 8.12 RCW and shall be governed by the regulations of the department of ecology as provided in RCW 90.48.110. [1988 c 127 § 2; 1967 ex.s. c 119 § 35A.80.010.]

APPENDIX G

Tacoma City Charter

Article IV §§ 4.5 & 4.6

TACOMA CITY CHARTER

Effective June 1, 1953
Last Amended November 4, 2014

responsibilities with reference to the control of animals. Such contract(s) shall provide, among other things, that said society or agency (agencies) shall faithfully operate said pounds, shall pay all expenses in connection therewith, shall receive all licenses, fines, penalties and proceeds of every nature connected therewith, and such other sums as may be legally appropriate therefor, subject only to accounting as provided by law. The Council is further authorized, notwithstanding the provisions hereof, to determine that the City shall operate its own city pounds or detention facility and otherwise regulate and control animals within its corporate limits. Any contract entered into pursuant to the authority hereof shall be subject to cancellation by the City for good cause.

(Amendment approved by vote of the people September 18, 1973)

Administrative Organization[12]

Section 3.11 – Within the framework established by this charter, the administrative service of the City government shall be divided into such offices, departments, and divisions as provided by ordinance upon recommendation of the City Manager. Such ordinance shall be known as the "Administrative Code."

Section 3.12 – The City Council may remove any appointed member of any City board, commission, or board of trustees, for cause, after notice and public hearing, if that member is found to have knowingly violated the oath of office under this charter (Section 6.4) or has committed any acts specified in state law as grounds for the recall and discharge of an elective public officer. The City Council, in its discretion, may allow a hearings examiner to hear such a matter. Recommendation of a hearings examiner shall be subject to review by the City Council. The City Council's final decision shall be based on the evidence in the record. A record of the proceedings shall be made.

(Amendments approved by vote of the people November 2, 2004, and November 4, 2014)

Section 3.13 – There shall be a Landmarks Preservation Commission, composed of members with such powers and duties as are provided by ordinance. The members shall be residents of the City of Tacoma and be appointed and confirmed by the City Council.

(Amendment approved by vote of the people November 4, 2014)

Article IV

PUBLIC UTILITIES[13]

General Powers Respecting Utilities

Section 4.1 – The City shall possess all the powers granted to cities by state law to construct, condemn and purchase, purchase, acquire, add to, maintain, and operate, either within or outside its corporate limits, including, but not by way of limitation, public utilities for supplying water, light, heat, power, transportation, and sewage and refuse collection, treatment, and disposal services or any of them, to the municipality and the inhabitants thereof; and also to sell and deliver any of the utility services above mentioned outside its corporate limits, to the extent permitted by state law.

Power to Acquire and Finance

Section 4.2 – The City may purchase, acquire, or construct any public utility system, or part thereof, or make any additions and betterments thereto or extensions thereof, without submitting the proposition to the voters, provided no general indebtedness is incurred by the City. If such indebtedness is to be incurred, approval by the electors, in the manner provided by state law, shall be required.

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[12] See TMC Chapter 1.06
[13] See TMC Title 12 - Utilities

Rates

Section 4.3 – The City shall have the power, subject to limitations imposed by state law and this charter, to fix and from time to time, revise such rates and charges as it may deem advisable for supplying such utility services the City may provide. The rates and charges for services to City departments and other public agencies shall not be less than the regular rates and charges fixed for similar services to consumers generally. The rates and charges for services to consumers outside the corporate limits of the city may be greater but shall not be less than the rates and charges for similar service to consumers within the corporate limits of the city.

Diversion of Utility Funds

Section 4.4 – The Council may by ordinance impose upon any of the City-operated utilities for the benefit of the general fund of the City, a reasonable gross earnings tax which shall not be disproportionate to the amount of taxes the utility or utilities would pay if privately owned and operated, and which shall not exceed eight percent; and shall charge to, and cause to be paid by, each such utility, a just and proper proportion of the cost and expenses of all other departments or offices of the City rendering services thereto or in behalf thereof.

Section 4.5 – The revenue of utilities owned and operated by the City shall never be used for any purposes other than the necessary operating expenses thereof, including the aforesaid gross earnings tax, interest on and redemption of the outstanding debt thereof, the making of additions and betterments thereto and extensions thereof, and the reduction of rates and charges for supplying utility services to consumers. The funds of any utility shall not be used to make loans to or purchase the bonds of any other utility, department, or agency of the City.

Disposal of Utility Properties

Section 4.6 – The City shall never sell, lease, or dispose of any utility system, or parts thereof essential to continued effective utility service, unless and until such disposal is approved by a majority vote of the electors voting thereon at a municipal election in the manner provided in this charter and in the laws of this state.

Franchises for Water or Electric Utilities

Section 4.7 – The legislative power of the City is forever prohibited from granting any franchise, right or privilege to sell or supply water or electricity within the City of Tacoma to the City or to any of its inhabitants as long as the City owns a plant or plants for such purposes and is engaged in the public duty of supplying water or electricity; provided, however, this section shall not prohibit issuance of temporary permits authorized by the Council upon the recommendation of the Utility Board of the City of Tacoma for the furnishing of utility service to inhabitants of the City where it is shown that, because of peculiar physical circumstances or conditions, the City cannot reasonably serve said inhabitants.

(Amendment approved by vote of the people September 18, 1973)

The Public Utility Board

Section 4.8 – There is hereby created a Public Utility Board to be composed of five members, appointed by the Mayor and confirmed by the City Council, for five-year terms; provided, that in the appointment of the first Board, on the first day of the month next following the taking of office by the first Council under this charter, one member shall be appointed for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years, and one for a term of five years, and at the expiration of each of the terms so provided for, a successor shall be appointed for a term of five years. Vacancies shall be filled for the unexpired term in the same manner as provided for regular appointments.

(Amendment approved by vote of the people November 2, 2004)

Section 4.9 – Members of the Board shall have the same qualifications as provided in this charter for Council Members. Members shall be entitled to reimbursement for expenses incurred in carrying out their official duties, other than those incident to attending board meetings held within the City of Tacoma.

(Amendment approved by vote of the people November 4, 2014)

Powers and Duties of the Public Utility Board

Section 4.10 – The Public Utility Board, subject only to the limitations imposed by this charter and the laws of this state, shall have full power to construct, condemn and purchase, acquire, add to, maintain, and operate the electric, water, and belt line railway utility systems.

Section 4.11 – All matters relating to system expansion and the making of additions and betterments thereto or extensions thereof, the incurring of indebtedness, the issuance of bonds, and the fixing of rates and charges for utility services under the jurisdiction of the Board shall be initiated by the Board, subject to approval by the Council, and executed by the Board; provided, that all rates and charges for utility services shall be reviewed and revised or reenacted by the Board and Council at intervals not exceeding five years and beginning with the year 1954.

Section 4.12 – The Board shall submit an annual budget to the Council for approval, in the manner prescribed by state law.

Section 4.13 – The Board shall select from its own membership a chair, vice-chair, and secretary and shall determine its own rules and order of business. The time and place of all meetings shall be publicly announced, and all meetings shall be open to the public and a permanent record of proceedings maintained. [14]

(Amendment approved by vote of the people November 4, 2014)

Section 4.14 – The Board shall maintain such billing, cost and general accounting records as maybe necessary for effective utility management or required by state law. Expenditure documents shall be subject to pre-audit by the central fiscal agency of City government. The City Treasurer shall be responsible for receipt, custody, and disbursement of all utility funds. The Board shall submit such financial and other reports as may be required by the Council.

Section 4.15 – The Board shall have authority to secure the services of consulting engineers, accountants, special counsel, and other experts. At intervals not exceeding ten years the Council shall, at the expense of the utilities involved, cause a general management survey to be made of all utilities under the jurisdiction of the board by a competent management consulting or industrial engineering firm, the report and recommendations of which shall be made public; provided, that the first such survey shall be made within three years of the effective date of this charter.

Section 4.16 – Insofar as is permitted by state law, the Board shall have the same authority, and be governed by the same limitations, in respect to the purchase of materials, supplies, and equipment and awarding of contracts for all improvements for Department of Public Utilities' purposes as does the Council and City Manager for general government purposes.

Section 4.17 – The Department of Public Utilities shall use the services of the City's General Government finance department, purchasing agent, law department, human resources/personnel department, and other City departments, offices, and agencies, except as otherwise directed by the City Council.

(Amendment approved by vote of the people November 3, 1992)

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[14] Chapter 42.30 RCW establishes the rules of procedure for Board meetings pursuant to the Open Public Meetings Act.

Administrative Organization

Section 4.18 – The Board shall appoint, subject to confirmation by the City Council, a Director of Utilities who shall:

(a) Be selected on the basis of executive and administrative qualifications;

(b) Be appointed for an indefinite period and subject to removal by the Board;

(c) Serve as the chief executive officer of the Department of Public Utilities, responsible directly to the Board, subject to review and reconfirmation as follows:

The Board shall review the Director's performance annually, and every two years shall, by an affirmative vote of at least three members of the Board in a public meeting, vote on whether to reconfirm the appointment, subject to reconfirmation by the City Council. The first review and vote on whether to reconfirm the Director shall be in 2015.

(Amendment approved by vote of the people November 4, 2014)

Section 4.19 – Except for purposes of inquiry, the Board and its members shall deal with officers and employees of the Department of Public Utilities only through the Director.

Section 4.20 – Insofar as is possible and administratively feasible, each utility shall be operated as a separate entity. Where common services are provided, a fair proportion of the cost of such services shall be assessed against each utility served.

Section 4.21 – Subject to confirmation by the Board, the Director of Utilities shall appoint a properly qualified superintendent for each utility system under the Director's administrative control.

(Amendment approved by vote of the people November 4, 2014)

Section 4.22 – There shall be such other officers and employees in the Department of Public Utilities as the Board may determine, who shall be appointed and removed by the Director of Utilities subject to the provisions of this charter relating to municipal personnel. These employees shall be entitled to participation in the general employee retirement system and to enjoy such other employee welfare benefits as may be provided for municipal employees. Within the limitations of the annual budget and salary ordinance, the salaries and wages of employees in the Department shall be determined by the Board.

Location and Relocation of Utility Works

Section 4.23 – The Board shall have authority to place poles, wires, vaults, mains, pipes, tracks and other works necessary to any utility operated by the Board in the public streets, alleys, and places of the city. Before any such works are commenced, plans and specifications showing the exact location thereof shall be submitted to the City Manager for approval. Whenever it shall be necessary by reason of the grading, re-grading, widening, or other improvement of any public street or alley to move or readjust the works of any utility, the Board shall cause such works to be so moved or readjusted and the expense thereof shall be charged against such fund as may be agreed upon by the Director of Utilities and the City Manager or as determined by the City Council. Upon placing the works of a utility in any public street, alley, or place, the Board, at the expense of the utility involved, shall cause the surface of such street or alley to be replaced as near as may be to its previous condition. Whenever the Board and the City Manager are unable to reach an accord concerning the moving, readjusting or installation of any utility, works or improvements, or the distribution of the expenses thereof, the matter shall be referred to the City Council, whose finding and determination shall be conclusive.

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **BRIEF OF RESPONDENT** on the 28th day of April 2023 as follows:

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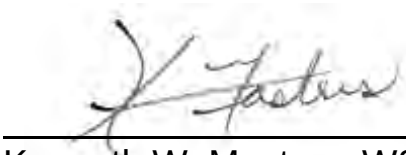

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April 28, 2023 - 1:10 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	57246-0
Appellate Court Case Title:	Thomas McCarthy, et al, Appellants v. City of Tacoma, Respondent
Superior Court Case Number:	19-2-07135-0

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